(17)

No. 99-401-CFX Title: California Democratic Party, et al., Petitioners
v.
Bill Jones, Secretary of State of California, et al.

Docketed: September 3, 1999 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Sep 2 1999	Petition for writ of certiorari filed. (Response due November 3, 1999)
	Sep 17 1999	Order extending time to file response to petition until November 3, 1999.
	Nov 1 1999	Motion of Republican Party of Alaska, et al. for leave to file a brief as amici curiae filed.
	Nov 3 1999	Brief of respondents Bill Jones, CA, Secretary of State, et al. in opposition filed.
	Nov 17 1999	DISTRIBUTED. December 3, 1999
	Dec 6 1999	REDISTRIBUTED. December 10, 1999
	Jan 3 2000	REDISTRIBUTED. January 7, 2000
	Jan 10 2000	REDISTRIBUTED. January 14, 2000
	Jan 18 2000	REDISTRIBUTED. January 21, 2000
	Jan 21 2000	Motion of Republican Party of Alaska, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 21 2000	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 3, 2000. The brief of respondents is to be filed with the Clerk and served upon opposing counsel onor before 3 p.m., Friday, March 31, 2000. A reply brief, if any, is to be filed with the Clerk and served uponopposing counsel on or before 3 p.m., Monday, April 17, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT April 24, 2000.
		**********
	Mar 2 2000	Brief amicus curiae of Brennan Center for Justice filed.
	Mar 3 2000	Joint appendix filed.
	Mar 3 2000	Brief of petitioners California Democratic Party, et al. filed.
	Mar 3 2000	Brief amici curiae of Northern California Committee for Party Renewal, et al. filed.
	Mar 3 2000	Brief amici curiae of Republican Party of Alaska, et al. filed.
	Mar 3 2000	Brief amici curiae-of Republican Natl. Committee and Democratic Natl. Committee filed.
	Mar 3 2000	Brief amici curiae of Eagle Forum Education and Legal Defense Fund, et al. filed.
	Mar 9 2000	CIRCULATED.
	Mar 16 2000	Record filed.
	Mar 31 2000	LODGING consisting of twenty bound copies of material (Vol.1) submitted by counsel for the respondent and distributed
	Mar 31 2000	Brief of respondents Bill Jones, Secretary of State of California, et al. filed.
	Mar 31 2000	LODGING consisting of twenty copies of material (vol.2) submitted by counsel for the respondent and distributed.

2 pp

No. 99-401-CFX

Entry	Date	Proceedings and Orders
	Mar 31 2000	Brief amici curiae of Washington and Alaska filed.
	Mar 31 2000	Brief amicus curiae of Alaskan Voters for an Open Primary (AVOP) filed.
	Mar 31 2000	Brief amici curiae of William Brock and John McCain, et al. filed.
	Mar 31 2000	Brief of California Governor Gray Davis filed.
	Apr 10 2000	Letter from counsel for the respondent received and distributed.
	Apr 17 2000	Reply brief of petitioners California Democratic Party, et al. filed.
	Apr 19 2000	Letter from Slade Gorton received and distributed.
	Apr 24 2000	ARGUED.

Supreme Court, U.S.
FILED
99 401 SEP 02 1999
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE AND FREEDOM PARTY, *et al.*,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA and CALIFORNIANS FOR AN OPEN PRIMARY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether California's new blanket primary law — which allows voters of any political affiliation to cross party lines at will and to participate in the selection of other parties' nominees — violates the First and Fourteenth Amendments to the United States Constitution.

Whether the associational rights of political parties are afforded less protection under the First Amendment than the associational rights of other private associations.

PARTIES TO THE PROCEEDING

Petitioners are the California Democratic Party, the California Republican Party, the Libertarian Party of California, the Peace and Freedom Party, Art Torres, Kathy Bowler, Paul Jorjorian, Gail Lightfoot, and C.T. Weber.

Respondents are Bill Jones, Secretary of State of California, and Californians for an Open Primary, as well as Michael Schroeder, Shawn Steel, and Donna Shalansky, who were plaintiffs/intervenors in the district court and appellants in the Ninth Circuit Court of Appeals.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is reported at *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999). The district court opinion (App. B) is reported at *California Democratic Party v. Jones*, 984 F. Supp. 1288 (E.D. Cal. 1997).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 4, 1999. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on June 4, 1999 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The First Amendment states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The full text of California's Proposition 198 is at App. D. The key provision of Proposition 198 is new California Elections Code section 2001, which states:

> All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation.

STATEMENT OF THE CASE

In March 1996 California voters adopted a new primary election law that allows voters of any political affiliation to vote in any party's primary election for any elective office. Shortly thereafter petitioners (four political parties and

certain party officials) filed an action in federal district court seeking to enjoin respondent California Secretary of State from implementing the new law. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction) and under 28 U.S.C. § 1343(a)(3) (jurisdiction to redress deprivation of rights guaranteed by the United States Constitution). After a four-day trial, the district court entered judgment in favor of respondent Secretary of State. The court of appeals affirmed and later denied a petition for rehearing.

A. The Effect of Proposition 198 on California Partisan Primary Elections.

For about the first 50 years of California's existence as a state, nominations for public office were made at party conventions. Legislative attempts to regulate the nomination process were held to violate the California Constitution.[1] The California Constitution was amended in 1908 to permit the state legislature to provide for direct nomination of candidates by primary election. The Primary Election Law of 1909 created a closed primary[2] and California primaries remained closed until the adoption of Proposition 198. California law allows electors to register or reregister up to 29 days before an election.[3] Thus the effect of California's prior closed primary law was to require voters to decide which primary they wanted to vote in at least 29 days before the primary.

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1. *Jones v. McCollister*, 159 Cal. App. 2d 708, 711 (1958).

2. In a closed primary, only voters who are registered with a political party are allowed to vote in that party's primary. For example, only registered Democrats can choose Democratic nominees for the ensuing general election.

3. CAL. ELEC. CODE § 2107.

Proposition 198 is a statutory initiative adopted by California voters at the March 1996 primary election. Proposition 198 creates a blanket primary system in which every primary voter receives the same ballot. Thus a primary voter can vote for a Democrat for Governor, a Republican for United States Senator, a Libertarian for Attorney General, a Peace and Freedom candidate for California State Senator, etc. As far as the voter is concerned, party registration makes no difference at all — each voter receives the same ballot. However, as far as the political parties are concerned, the primary remains a partisan nominating process. Candidates are listed on the primary ballot according to their party affiliation and, if successful, become their party's "nominee." At the ensuing general election, a candidate "representing" each party will appear on the ballot.

The ballot argument in favor of Proposition 198 demonstrates that one goal of its proponents was ideological — to produce more "moderate" party nominees:

> It [the closed primary] favors the election of party hardliners, contributes to legislative gridlock, and stacks the deck against more moderate problem-solvers.

ER[4] 33 at 715.

By adopting Proposition 198, California joins three other states — Alaska, Louisiana, and Washington — that have blanket primary elections.

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4. "ER" refers to the Excerpts of Record filed in the Court of Appeals.

B. Proceedings Below

Petitioners are four California political parties from across the political spectrum. Two petitioners — California's Republican and Democratic parties — will be well known to the Court. The two others are small parties that require a short introduction. Petitioner Libertarian Party of California was formed in 1972 and opposes many existing forms of government regulation:

> [W]e oppose all interference by government in the areas of voluntary and contractual relations among individuals. People should not be forced to sacrifice their lives and property for the benefit of others. They should be left free by the government to deal with one another as free traders; and the resultant economic system, the only one compatible with the protection of individual rights, is the free market.

ER 20 at 588 [Libertarian Party Statement of Principles]. The Peace and Freedom Party was formed in 1968 to nominate a presidential candidate who would oppose United States involvement in Vietnam. In 1974 the party formally declared itself in support of socialism. ER 15 at 426 [Expert Report of Richard Winger]. Today the party platform advocates doubling the minimum wage, abolishing NAFTA and GATT, and guaranteeing self-determination for Puerto Rico and all United States territories. ER 30 at 702 [1996 Platform].

The district court conducted a four-day nonjury trial in the summer of 1997. The evidence put on by the political party petitioners all went to one basic point: The choosing of a nominee is inextricably linked to defining a party's

ideology. By inviting nonmembers to participate in the primary, Proposition 198 will allow outsiders to determine a party's ideology. A significant part of respondent Secretary of State's evidence went to establish the fact that Proposition 198 would in fact produce more moderate candidates. ER 6 at 204 [testimony of Professor David Olson]; ER 10 at 269-269A [testimony of Professor Elizabeth Gerber].

The district court awarded judgment to respondents. The district court stated that political parties are significantly regulated by the state and that the analogy between political parties and other private associations is therefore "imperfect at best." App. B at 65a. The court went on to find that "the blanket primary imposes a significant but not severe burden on [petitioners'] associational rights." App. B at 77a. Using the balancing test articulated by this Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), the district court concluded that this burden was justified by state interests advanced by Proposition 198, which it characterized as "enhanc[ing] the democratic nature of the election process and the representativeness of elected officials." App. B at 80a.

The Court of Appeals adopted the district court's opinion and affirmed the district court's judgment. App. A at 8a.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE NINTH CIRCUIT.

The court of appeals' holding that Proposition 198 imposes "a significant but not severe burden on [political parties'] associational rights" cannot be squared with Supreme Court precedent. *See* App. A at 37a.

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) is the case most directly on point. *Tashjian* concerned a situation almost the mirror image of that presented here. A state party adopted a rule opening its primary to unaffiliated voters, and then challenged a state law that required a closed primary. *Id.* at 212. This Court noted that "the right to associate with the political party of one's choice" is a freedom protected by the First and Fourteenth Amendments, and that "the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' " *Id.* at 214, *quoting Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981). The Connecticut closed primary law trenched on these associational rights by

> plac[ing] limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The State thus limits the Party's

> associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Id. at 215-216 (internal citation omitted). Having reached that conclusion, the Court closely reviewed Connecticut's justifications for the closed primary law. Finding the proffered interests insubstantial, the Court held the closed primary statute unconstitutional as applied to the Connecticut Republican Party. *Id.* at 225.

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989), concerned the validity of several provisions of the California Elections Code that: (1) prohibited preprimary endorsements by ballot-qualified political parties; (2) regulated the composition of the parties' governing bodies; (3) limited the term of office of party chairs; and (4) required that the chair rotate between residents of northern and southern California. The Supreme Court affirmed a judgment enjoining enforcement of all these statutes, stating:

> It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to "identify the people who constitute the association," and to select a "standard bearer who best represents the party's ideologies and preferences."

Id. at 224 (internal citations omitted).

This Court recently reaffirmed its holdings in *Tashjian* and *Eu*. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) upheld a Minnesota law barring fusion candidates.[5] However, *Timmons* stressed that "[t]he New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes. . . . *That is, the New Party, and not someone else, has the right to select the New Party's 'standard bearer.'* " *Id.* at 1370 (internal citation omitted) (emphasis added). *Timmons* went on to state that "while *Tashjian* and *Eu* involved regulation of political parties' internal affairs and core associational activities, Minnesota's fusion ban does not." *Ibid.* Thus *Timmons* makes clear that *Tashjian* is still good law and that it stands for the proposition that a political party's choice of a nominee is a core associational activity that is protected by the First Amendment.

The decision below cannot be reconciled with *Tashjian*. There is nothing peculiar to California parties that would make them less entitled than Connecticut parties to protection of their associational rights "at the crucial juncture at which the appeal to common principles may be translated into concerted action[.]" *See Tashjian*, *supra*, 479 U.S. at 215-216. Nor is there anything peculiar to California about the numerous state interests allegedly served by the blanket primary. The court below noted that all these various interests boil down to one contention: The blanket primary will enhance the democratic nature of elections and the representativeness of public officials. App. A at 39a. Any state could and would make the same claim about any change to its primary system. Further, it would seem that the

5. Fusion is "the nomination by more than one political party of the same candidate for the same office in the same general election." *Id.* at 1367, n.1.

associational right asserted here is stronger than the right asserted in *Tashjian*. Petitioners in the present case seek to choose their own nominees; the Connecticut Republican Party sought to allow outsiders to join in the nomination process. The First Amendment protects the right of *the party* to choose its own standard bearers. *Eu*, *supra*, 489 U.S. at 224.

The decision below also conflicts with previous opinions of the Ninth Circuit. *Lightfoot v. Eu*, 964 F.2d 865, 870 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993), concerned a challenge to a California statute that prohibited successful primary write-in candidates from appearing on the subsequent general election ballot unless they received at least one percent of the total vote. The Libertarian Party challenged the statute on the ground that there was no voting district in California with a sufficient number of Libertarians to meet the one percent threshold, so a write-in candidate who won the Libertarian primary could never appear on the general election ballot. *Id.* at 869. The *Lightfoot* court upheld the state statute, stating that the Libertarian Party could exceed the one percent threshold in the future by opening its primary to non-Libertarians:

> The Libertarian Party could broaden the number of voters that participate in its primary by opening its currently closed primary to non-Libertarians, and the State could not prevent it from doing so. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (holding that state law requiring that voters in party primary be registered members of the party violates First Amendment right to freedom of association).

Id. at 870. *See also San Francisco County Democratic Cent. Committee v. Eu*, 826 F.2d 814, 831 (9th Cir. 1987), *aff'd sub nom., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) ("A party's survival depends upon its ability to compete in the free marketplace of political ideas and ideals. The First Amendment limits states to a neutral role in that competitive process. A state may not interfere with the associational rights of political parties beyond what is necessary to assure honest and orderly elections.")

The Libertarian Party has received conflicting messages from the Ninth Circuit. First, if the Libertarian Party wishes to adopt a rule opening its primary to non-Libertarians, that rule will prevail over conflicting state law.[6] *Lightfoot*, *supra*. Second, if the Libertarian Party wishes to adopt a rule closing its primary to non-Libertarians, the rule will not prevail over conflicting state law. App. A. There is no basis in the Constitution for this difference in results.

II. The Questions Presented Are Important.

The court below concluded that various state interests outweigh "the substantial interest that the political panties have in controlling who votes in the primary." App. A at 43a. Describing the parties' interest as "substantial" is something of an understatement. A political party has been aptly described as:

> a voluntary association, instituted for political purposes, with the goal of effectuating the will of its members. The party's ultimate goal, in the

6. The Libertarian Party does not wish to open its primary to non-Libertarians.

> electoral process, is to obtain control of the levers of government by winning elections, so that it may then put into operation its policies and philosophies. . . . In order to accomplish this goal, the party seeks to nominate those candidates who are most likely to win the general election, while remaining most faithful to the party's (i.e., its members') policies and philosophies. *The party's selection of its candidates therefore is an ultimate and crucial element of the party members' political activities.*

Nader v. Schaffer, 417 F. Supp. 837, 847 (D. Conn. 1976) (citations omitted, emphasis added), *aff'd*, 429 U.S. 989 (1976); *see also Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring and dissenting) (political parties "exist to advance their members' shared political beliefs," and "in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa"); *Anderson v. Celebrezze*, 460 U.S. 780, 821 (1983) (Rehnquist, J., dissenting) ("Political parties have, or at least hope to have, a continuing existence, representing particular philosophies. Each party has an interest in finding the best candidate to advance its philosophy in each election"). As E. E. Schattschneider stated in his classic 1942 study of American parties, nominations are "the most important activity of the party. . . . If a party cannot make nominations it ceases to be a party . . . he who can make the nominations is the owner of the party." E.E. Schattschneider, *Party Government* (Rinehart 1942), quoted in ER 17 at 478.

The decision below was heavily influenced by the court of appeals' conclusion that "at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations." App. A at 26a. The court of appeals noted that voters who register in a party do not pay dues and do not take an oath, they simply sign a registration card. *Ibid.* However, it should be noted that parties are not restrictive about their membership because they are prohibited by law from being restrictive. California law allows any qualified voter to affiliate with a political party by signing a registration card.[7] Left to their own devices at an earlier point in this country's history, the parties were considerably more restrictive. Samuel Adams' description of a caucus meeting antedates the Revolution:

> This day learned that the Caucus Club meets at certain times in the garret of Tom Dawes, the Adjutant of the Boston Regulars. He has a large house . . . and the whole club meets in one room. There they smoke tobacco till you cannot see from one end of the garret to the other. There they drink flip I suppose and they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, collectors, fierwards, and representatives are regularly chosen before they are chosen in town. . . .

Bone, *American Politics and the Party System* 507 (1949); quoted in L. Friedman, "Reflections Upon the Law of Political Parties," 44 Cal. L. Rev. 65 (1956). Abuses of the caucus system led to Progressive Era reforms and eventually to the current registration system which makes it very easy

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7. CAL. ELEC. CODE § 2151.

for a voter to affiliate with a party. But a new Draconian restriction of party rights (the blanket primary) cannot be justified by pointing out that party rights are already limited in some respects. This approach would legitimate a complete extinction of party associational rights, so long as the extinction were accomplished incrementally.

While the court below was correct to note that the American experience has required accommodation between party associational rights and state power to regulate the election process, the decision below results in capitulation, not accommodation. The blanket primary is the nominating process most intrusive into party associational rights because it denies the very existence of those rights. If a party's First Amendment right to "choose the standard bearer of its choice" does not protect it from a blanket primary, that right is little more than a mirage. *See Eu, supra*, 489 U.S. at 224.

Finally, it is more than a little disturbing that Proposition 198 has been promoted and defended as producing more moderate candidates. To borrow respondents' antiseptic phraseology from the proceedings below, under the blanket primary, nominees will "stand closer to the median policy positions of their districts[.]" Appellee's and Intervenor's Brief [6/25/98] at 51. This Court has stated more than once that as to the question of what is in a party's best interests, "a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 123-124 (1981); *Tashjian, supra*, 479 U.S. at 222-224; *Eu, supra*, 489 U.S. at 227-228. Likewise, as to ideology, a State may not constitutionally substitute its judgment for that of a party.

III. The Decision of the Court of Appeals Has a Particularly Debilitating Effect on California's Minor Parties.

The blanket primary will be most debilitating to California's Peace and Freedom and Libertarian parties, and to other minor parties. These parties are explicitly ideological. They have decided that winning elections in the short run is less important than adhering to a deep-seated ideology and hoping to win public support in the long run. Both parties have a registration of under one percent of the total electorate. The blanket primary will allow the other ninety-nine percent of the electorate to join in the nominating process, flooding future Peace and Freedom and Libertarian primaries with voters who know nothing about these parties and who do not share their ideology. In the most fundamental way, the blanket primary will deny minor party members the right to choose their own nominees.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MARCH 4, 1999

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA DEMOCRATIC PARTY; ART TORRES; KATHY BOWLER; PAUL JORJORIAN; PEACE AND FREEDOM PARTY; C.T. WEBER; LIBERTARIAN PARTY OF CALIFORNIA; GAIL LIGHTFOOT,

Plaintiffs-Appellants,

and

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER; SHAWN STEEL; DONNA SHALANSKY,

Plaintiffs-Intervenors,

v.

BILL JONES, Secretary of the State of California,

Defendant-Appellee,

v.

CALIFORNIANS FOR AN OPEN PRIMARY,

Defendant-Intervenor-Appellee.

No. 97-17440

D.C. No. CV-96-02038-DFL

OPINION

CALIFORNIA DEMOCRATIC PARTY; ART TORRES; KATHY BOWLER; PAUL JORJORIAN; PEACE AND FREEDOM PARTY; C.T. WEBER; LIBERTARIAN PARTY OF CALIFORNIA; GAIL LIGHTFOOT,

Plaintiffs,

and

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER; SHAWN STEEL; DONNA SHALANSKY,

Plaintiffs-Intervenors-Appellants,

v.

BILL JONES, Secretary of the State of California,

Defendant-Appellee.

No. 97-17442

D.C. No. CV-96-02038-DFL

Appeals from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
October 7, 1998—San Francisco, California

Filed March 4, 1999

Before: Procter Hug, Jr., Chief Judge, Betty B. Fletcher and Stephen S. Trott, Circuit Judges.

Opinion by Judge B. Fletcher

SUMMARY

Government Law/Elections

The court of appeals affirmed a judgment of the district court. The court held that a state initiative measure that converts a closed primary election to an open or "blanket" form does not violate the First Amendment associational rights of political parties or their officials.

In 1996, California voters adopted Proposition 198 and established the Open Primary Act, which converted the State's primary election from closed to an open or "blanket" primary: voters can vote for any candidate regardless of the candidate's or the voter's party affiliation. Appellant California Democratic Party and other political parties and officials sued appellee California Secretary of State, alleging that Proposition 198 violated their First Amendment right of association.

The district court ruled that the burdens imposed on the plaintiffs' associational rights by Proposition 198 were not sufficient to render the Open Primary Act unconstitutional, and were outweighed by compelling interests of the State and its electorate. The parties and party officials appealed.

[1] The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. As a result, political parties' government, structure, and activities enjoy constitutional protection. However, the states also have a strong interest in the conduct of elections that is matched by state control over the election process for state offices.

[2] The Supreme Court has never directly considered the constitutionality of a blanket or open primary. Two state supreme courts have concluded that a blanket primary withstands a party's First Amendment challenge.

[3] In evaluating the constitutionality of Proposition 198, it was necessary to determine the character and magnitude of the burdens imposed on the associational rights of the political parties, and then consider the state's interests against the burden. The greater the intrusion, the greater had to be the State's interests and the more narrowly tailored Proposition 198 had to be to advance them.

[4] The parties contended that their interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how Proposition 198 will work, the blanket primary was unconstitutional on its face. While the interest in determining who will vote in a primary is protected by the First Amendment, this was not the end of the inquiry. If it were, open primaries would also be unconstitutional on any party's objection: an open primary permits voters who are not registered in a party to vote in that party's primary. But many states have some version of an open primary, and to invalidate them on this ground would be an extraordinary intrusion into state election laws, and would remove from the American political system a method for candidate selection that may states consider beneficial, and which could take on new appeal and importance.

[5] Were the parties' power to determine membership and to select their nominees unfettered, the states would lack power to prescribe candidate selection through a primary election, or to require that all voters who have met a state's registration requirements be permitted to vote in the parties' primaries notwithstanding any other membership requirement a party might impose. However, states have considerable regulatory authority over the process of candidate selection, and may require that parties select their candidates by a primary election open to registered voters. The state's power over political parties stems from the Constitution and from the public functions the parties perform in the candidate-nominating and political processes.

[6] The parties contended that a blanket primary process would have a destructive effect on all political parties, that there would be widespread cross-over voting, and that the consequences will be many and adverse to the parties. [7] A cross-over voter is one who votes for a candidate of a party in which the voter is not registered.

[8] The evidence suggested that cross-over voting will be more prevalent after Proposition 198. Nonetheless, the parties' characterization of the likely amount or effects of cross-over voting due to a blanket primary was overdrawn.

[9] Although cross-over voting typically does not change the outcome of a primary and may not be much greater in a blanket than in a closed primary, it is probable there will be elections under Proposition 198 that will be decided by the cross-over vote. [10] Furthermore, the possibility of a decisive cross-over vote could affect the conduct of elections and election officials. Candidates will perceive a need or opportunity to attract support from the entire electorate. This will affect the cost of the primary and may affect the positions candidates take on issues. Once elected, candidates may perceive that the cross-over vote makes them less vulnerable at the primary to the party organization or party regulars. The corollary is a loss of power to party activists.

[11] The parties contended that their governing bodies may be adulterated, and that their national organizations may not accept the results of the California presidential primary if it is a blanket primary. However, these contentions were not particularly forceful. The California parties could be forced to adopt a different procedure for delegate selection other than the presidential primary, or they could receive a waiver from their national organizations.

[12] The magnitude of the burdens imposed on the parties by Proposition 198 was not either "severe" or "negligible." State law requires each party to select its candidate through a

primary, and the winner of a primary will be the party's nominee. The blanket primary wrests a measure of control of the primary process from the party and its members. This is its purpose. By permitting non-party members to vote in a party's primary, Proposition 198 is an intrusion on a party's right to select its own candidate.

[13] On the other hand, the burdens on the parties due to Proposition 198 were not likely to prove severe or debilitating. Proposition 198 would not diminish the efficacy or strength of political parties in California to any substantial degree. The parties did not show that the blanket primary is significantly different from the closed primary, or contend that Proposition 198 had any discriminatory purpose or effect. The burden of a blanket primary falls evenly on all parties. Proposition 198 left untouched the wide field of party endeavor that is not directed specifically to the primary, such as developing the platform, registering voters, and getting out the vote.

[14] In light of all these considerations, the parties showed that the blanket primary imposes a significant but not severe burden on their association rights. To survive the challenge, Proposition 198 had to be supported by interests that were sufficient to outweigh the burdens. Those interests did not have to be compelling, given that the burdens were not crushing, but they had to be important.

[15] The states have broad regulatory authority over the conduct of elections, including primaries. **[16]** The state interests furthered by Proposition 198 all reduced to one fundamental contention: Proposition 198 enhanced the democratic nature of the election process and the representatives of elected officials.

[17] A blanket primary opens the candidate-selection process to two types of arguably "disenfranchised" voters—independents and minority party voters in safe districts. In a

blanket primary, independent voters will be able to participate in framing the choice that they will have to make in the general election.

[18] Taken as a whole, the State's interests that supported the blanket primary were substantial, indeed compelling. There is a substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community. Increasing the representatives of elected officials, giving voters a greater choice, and increasing voter turnout and participation in the primary process are all interests of the first order. The voters' belief in the fairness of the electoral process is also a substantial state interest. It was apparent that California voters believed that the system is fairer when all voters participate in framing the choice of candidates at the general election. These interests outweighed the interest political parties had in controlling who votes in the primary.

COUNSEL

George Waters, Olson, Hagel, Leidigh, Waters & Fishburn, Sacramento, California, for the plaintiffs-appellants.

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John E. Mueller, Nielsen, Merksamer, Parrinello, Mueller & Naylor, Mill Valley, California, for the intervenors-plaintiffs-appellants.

James P. Clark, Gibson, Dunn, & Crutcher, Los Angeles, California, for the intervenor-defendant-appellee.

Appendix A

OPINION

B. FLETCHER, Circuit Judge:

In 1996 California voters passed Proposition 198, which converted the State's primary election from a closed to a blanket primary in which voters may vote for any candidate regardless of the voter's or candidate's party affiliation. Appellants, the California Democratic, Republican, Libertarian, and Peace and Freedom Parties, together with other individuals, opponents of Proposition 198, seek reversal of the district court's judgment upholding its constitutionality. *California Democratic Party v. Jones*, 984 F. Supp. 1288 (E.D. Cal. 1997). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

STANDARD OF REVIEW

We review the constitutionality of a statute de novo. *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1249 (1997). A district court's determinations on questions of law and on mixed questions of law and fact that implicate constitutional rights are also reviewed de novo. *Neal v. Shimoda*, 131 F.3d 818, 823 (9th Cir. 1997); *Jacobsen v. United States Postal Serv.*, 993 F.2d 649, 653 (9th Cir. 1992). We have undertaken that review.

CONCLUSION

We have reviewed the briefs to this court, the record made before the district court, and the careful, detailed, and eloquent opinion of the district court. Because we concur in it in every respect, we have elected to adopt it as the opinion of our court. We attach it as an appendix. It also may be found at 984 F. Supp. 1288 (E.D. Cal. 1997) *sub nom. California Democratic Party v. Jones*. The judgment of the district court is AFFIRMED.

Appendix A

APPENDIX

CALIFORNIA DEMOCRATIC PARTY, Art Torres, Kathy Bowler, Paul Jorjorian, Peace and Freedom Party, C.T. Weber, Libertarian Party of California and Gail Lightfoot, Plaintiffs,

v.

Bill JONES, Secretary of State of the State of California, Defendant.

California Republican Party, Michael Schroeder, Shawn Steel and Donna Shalansky, Intervenors/Plaintiffs,

Californians for an Open Primary, Intervenor/Defendant.

No. CIV. S-96-2038 DFL.

United States District Court, E.D. California.

Nov. 17, 1997.

As Corrected Nov. 24, 1997.

MEMORANDUM OF OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

LEVI, District Judge.

In March of 1996, the people of the State of California, by a wide margin, adopted Proposition 198, an initiative statute known as the Open Primary Act. Proposition 198 converts the State's primary election from a closed to an open or blanket primary in which voters may vote for any candidate regardless of the candidate's or the voter's party affiliation. In a blanket primary under Proposition 198, one ballot will be prepared at the primary election for all voters just as in the general election. Because a blanket primary permits voters to vote in the primary election of a party without being registered in that party, the political parties and party officials who bring this action contend that Proposition 198 violates their right of

association guaranteed by the First Amendment of the Constitution.

The court concludes that Proposition 198 withstands this constitutional challenge.

I.

Under Proposition 198 "All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote ... at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation." [FN1] By this language and the conforming amendments to the State Election Code, Proposition 198 changed the California primary from a closed to an open or blanket system. [FN2] As the Legislative Analyst explained in the ballot pamphlet distributed to voters before the election, under the closed system "[i]n order to vote in primary elections for partisan offices, a voter must have identified a political party affiliation when registering to vote and can vote only for candidates of that party." Defs.' Ex. A at 5. Thus, for example, in the closed primary a registered Democratic Party voter receives a ballot that includes only candidates competing for the Democratic Party nomination. Only registered Democrats could vote for these candidates, and the winner of the primary would be the Democratic Party's candidate at the general election. [FN3] By contrast, the Legislative Analyst explained, in the blanket primary instituted by Proposition 198:

> FN1. Proposition 198 added to the Election Code the language quoted in text as a new § 2001. The Proposition also made conforming amendments to §§ 2151, 13102, 13203, 13206, 13230, 13300, 13301, and 13302. See Defs.' Ex. A.
>
> FN2. California has had a closed primary since 1909 when the State substituted direct nomination of candi-

> dates by primary elections in place of nominating conventions held by the political parties. In 1900 California briefly experimented with a blanket primary, but the California Supreme Court held it unconstitutional under the State Constitution. See Britton v. Board of Election Comm'rs, 129 Cal. 337, 346-47, 61 P. 1115 (1900). No claim is made under the State Constitution in the present case.
>
> FN3. Cal. Elec.Code § 15451 provides: "The person who receives the highest number of votes at a primary election as the candidate of a political party for nomination to an office is the nominee of that party at the ensuing general election."

> [A]ll persons who are entitled to vote in primary elections, including those not affiliated with a political party [are allowed to] vote for any candidate regardless of the candidate's political party affiliation. Thus, voters in primary elections would be allowed to vote for candidates across political party lines. Furthermore, the initiative provides that county elections officials prepare only one ballot for all voters. The candidates for an office would be listed randomly on the ballot and not grouped by political party affiliation. The candidate of each political party who receives the most votes for a state elective office becomes the nominee of that party at the next general election.

Defs.' Ex. A at 5. Therefore, in the blanket primary after Proposition 198, a registered Democratic Party voter, for example, could vote for a Republican Party candidate for Governor and a Democratic Party candidate for Assembly, and so on down the ballot. An independent voter could do the same. [FN4] Through such cross-over voting, it is possible under the blanket primary for independent voters and voters registered in one party to participate in the primary election of another party.

FN4. The election of political party committee members is not affected by Proposition 198. As to these party offices, voters may only vote for candidates of their own party registration.

In the statement of support included in the ballot pamphlet, proponents of Proposition 198 argued that the closed primary "favors the election of party hard-liners, contributes to legislative gridlock, and stacks the deck against more moderate problem-solvers." The open primary would permit voters to vote "for the best candidate for each office, regardless of party affiliation" thereby giving voters greater choice. In addition, according to proponents, the blanket primary would increase voter participation in the primary election, restore healthy competition particularly in "safe" legislative districts in which one party clearly dominates, make elected officials more responsive to voters as opposed to party officials, reduce the power of special interest groups, and strengthen the political parties by assuring the nomination of candidates with broader bases of support. Opponents of Proposition 198 contended that it would work an unconstitutional interference with the right of the parties to choose their nominees: "Allowing members of one party a large voice in choosing another party's nominee—which Proposition 198 would do—is like letting UCLA's football team choose USC's head coach!" [FN5] According to the opponents, the existing closed primary provided a "real choice" among candidates of different parties while a blanket primary would be "an invitation to political mischief" by special interests and political consultants. Defs.' Ex. A at 6-7. [FN6]

FN5. "Should Democrats be allowed to nominate Republican candidates for office? No! Should Republicans be allowed to nominate Democratic candidates for office? No!" Defs.' Ex. A at 7.

FN6. In light of the arguments for and against presented in the ballot pamphlet, it cannot fairly be argued

that the voters were misled or inadequately advised as to the effects and purposes of Proposition 198. Compare Jones v. Bates, 127 F.3d 839 (9th Cir.1997), reh'g granted, 129 F.3d 494 (1997) (majority of panel concludes that voters were not adequately advised as to effect of Proposition 140, the term limit initiative).

At the election, Proposition 198 was adopted by a convincing margin of those voting—59.51 percent (3,340,642 votes) to 40.49 percent (2,273,064 votes). According to reliable exit polls, Proposition 198 was supported by 61 percent of Democrats, 57 percent of Republicans, and 69 percent of Independents. The measure was supported by a majority of every demographic subgroup, including groupings by sex, age, race, education, political ideology, income, religion and party identification. Defs.' Exs. B & D. Proposition 198 commanded majorities in every county in California and in 75 of the 80 Assembly districts. Defs.' Ex. I. Although the turnout by California's six minor parties was too small to sample, given the broad public support for Proposition 198 among all groups of every sort, it is likely that a majority of the members of these parties also favored the initiative. R.T. at 847 (Testimony of Thomas Quinn). Moreover, the vote on Proposition 198 reflects the long-standing support for an open primary among California voters. According to Mervin Field, an eminent California political polling expert, Californians have favored an open primary by wide margins since at least 1983. See Defs.' Exs. L-2 & L-5. [FN7]

FN7. Mervin Field testified at the trial to his conclusion that as to Proposition 198 "there was remarkable consistency over a 13-year period, and that when the vote on Prop 198 was in, comparing that with the study that we did then 13 years prior, it showed that this concept, as it's posed here, and as it was posed in 198, struck a deep-seated chord with the voting public." R.T. at 645.

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By passing Proposition 198, California joined a small group of states, consisting of Alaska, Louisiana, and Washington, who also have blanket or nonpartisan primary elections. The other states have either a closed or an open primary, or some variant of the closed or open primary. [FN8] In the classic closed primary, such as California had prior to Proposition 198, participation in a party's primary election is limited to voters who have registered as members of that party a specified period of time prior to the primary election. Fifteen states have closed primaries of this kind. See Defs.' Ex. E, Gerber Report, at 2-4. Eight additional states have a "semi-closed" primary: participation in a party's primary is limited to those who have registered as party members and independents. Id. Participation of registered members of other parties is not permitted.

> FN8. "The distinctions between open and closed primaries are easy to exaggerate. Too simple a distinction ignores the range of nuances and varieties within the closed primary states." F. Sorauf, Party Politics in America 206 (4th ed.1980), quoted in Democratic Party of United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 133 n. 8, 101 S.Ct. 1010, 1025 n. 8, 67 L.Ed.2d 82 (1981) (Powell, J., dissenting). Similarly, there are many variations within the open and blanket primary states.

In an open primary, a registered voter may request, on election day, the ballot for any party's primary in which the voter intends to vote, whether or not the voter previously has registered as a member of that party; however, the voter may only vote in one party's primary election. Twenty-one states have an open primary in this sense of the term. Id. [FN9] Finally, four states have blanket or nonpartisan primaries. The blanket primary is a version of the open primary in which the voter is not limited to the ballot of any single party. All voters receive the same ballot, and a voter is not limited to the candidates of any single party but may vote, as to each office con-

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tested, for any candidate regardless of party affiliation. This is the primary system in Washington and Alaska, and is the system adopted by Proposition 198. Alaska first adopted a blanket primary in 1947 and has had a blanket primary since that time with the exception of the period from 1960 to 1966 when it adopted a traditional open primary. Washington has had a blanket primary continuously since 1935. Finally, Louisiana has a version of a blanket primary, a nonpartisan primary open to all registered voters. Similar to the blanket primary in the sense that a voter can vote for any candidate without regard to party affiliation and is not limited to one party's nominees, the nonpartisan primary differs because "[t]he two top vote receivers, regardless of party, meet in a subsequent (runoff or general) election." Id. at 3.

> FN9. The open primary is sometimes defined more narrowly to include only those primaries in which the " 'voter is not required to declare publicly a party preference or to have that preference publicly recorded.' " Democratic Party of United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 112 n. 4, 101 S.Ct. 1010, 1014 n. 4, 67 L.Ed.2d 82 (1981) (citation omitted). Approximately ten states have this kind of open primary. See Pls.' Ex. 7, Costantini Report at 3; Tashjian v. Republican Party of Conn., 479 U.S. 208, 222 n. 11, 107 S.Ct. 544, 552 n. 11, 93 L.Ed.2d 514 (1986). The other states follow practices that are sometimes classified as "semi-open" or "semi-closed." In these states the voter is permitted to request any party's ballot the day of the primary, but some record of the request is made or a public statement of party affiliation is made prior to voting.

"The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century and no consensus has as yet emerged." Tashjian v. Republican Party of Conn., 479 U.S. 208, 222, 107 S.Ct. 544, 552, 93 L.Ed.2d 514 (1986). It is apparent from this very

case that the States continue to debate the question and to try new approaches. [FN10]

FN10. When the Supreme Court decided Tashjian in 1986 it found that 21 states provided for the classic closed primary. According to Professor Gerber, as of 1990 the number of closed primaries had fallen to sixteen, including California. See Defs.' Ex. E., Gerber Report, at 2. Because it is not easy to classify the differing systems and because analysts use somewhat different definitions of the "closed" and "open" primaries, this change in numbers may be more the product of differing classification systems than changes in the states' election laws. The Tashjian Court also found that four states, including Virginia, had blanket primaries. The inclusion of Virginia as a blanket state appears to have been in error. See Va.Code § 24.1-182 ("No person shall vote for the candidates of more than one party.").

All of the four political party plaintiffs in this case have bylaws that prohibit persons who are not registered in their parties from voting in their parties' primary. Article X, § 8 of the By-Laws & Rules of the California Democratic Party states that "No person shall be entitled to vote for a Democratic candidate at a partisan primary election unless he or she is a registered Democrat." Pls.' Ex. 1 at 36. The Republican Party also disputes the legitimacy of an open or blanket primary: "The [State Central] Committee shall recognize only those partisan nomination processes under California law that limit the electorate for partisan nomination elections to registered Republican voters, and which do not impose upon the Committee, without its express concurrence, a nomination process open to voters registered in other parties or as decline to state." Defs.' Ex. S at 2. The Peace & Freedom Party State Central Committee By-Laws and the Libertarian Party of California Bylaws have similar provisions. See Pls.' Ex. 3 at 6, and Ex. 4 at 13. [FN11]

FN11. The Democratic National Committee's charter requires that state party delegates to the national convention be chosen through "processes which ... restrict participation to Democrats only." Pls.' Ex. 2 at 2 (Art. 2, § 4(e)). See also Pls.' Ex. 9 at 4 (Rules 2.A. and 2.B. of the Delegate Selection Rules). The Rules of the Republican Party have a similar rule against blanket and open primaries. See Defs.' Ex. T at 25 (Rule No. 34(f)).

The California Democratic Party, the Peace and Freedom Party, and the Libertarian Party of California and certain of their officers brought this action against the Secretary of State of the State of California seeking a declaration that Proposition 198 is unconstitutional and requesting an injunction against its implementation. [FN12] The California Republic Party and certain of its officers intervened as plaintiffs. Californians For An Open Primary intervened as a defendant. [FN13] The court heard testimony over four days and has received numerous exhibits, including the reports of various experts.

FN12. It appears that the political parties did not mount a campaign against Proposition 198 with the voters at the time of the election. See R.T. at 230; Nader v. Schaffer, 417 F.Supp. 837, 850 (D.Conn.1976), aff'd without opinion, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976) (criticizing plaintiffs for "seeking a change in the law by judicial fiat" rather than by political activity).

FN13. For ease of reference, throughout this opinion the terms "plaintiffs" and "defendants" shall include the intervenors, and when the political "parties" are referred to as taking a position in this action, the term shall include the individual officers who are also plaintiffs.

II.

[1] [1] This case presents two competing views as to the function of the direct primary and, to some extent, as to the function of the political parties. From the parties' perspective, the parties are autonomous organizations and the primary is their opportunity to select their leaders and to define their positions on political questions. From the defendants' perspective, the primaries are the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders, and the political parties, as they operate to frame the choice of candidates, are a part of a highly regulated governmental activity—the election process. Both positions find support in the Constitution and the relevant case law. The "freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 214, 107 S.Ct. 544, 548, 93 L.Ed.2d 514 (1986). "As a result, political parties' government, structure, and activities enjoy constitutional protection." Timmons v. Twin Cities Area New Party, ___ U.S. ___, ___, 117 S.Ct. 1364, 1369, 137 L.Ed.2d 589 (1997). However, the States also have a strong interest in the conduct of elections. "[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." Tashjian, 479 U.S. at 217, 107 S.Ct. at 549. It is the clash of these two constitutionally rooted interests that must be resolved in this case.

[2] The Supreme Court has never directly considered the constitutionality of a blanket or open primary. In Democratic Party of United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981), the Court had the opportunity to decide the constitutionality of Wisconsin's open primary but decided the case on a different basis, merely noting that the State Supreme Court had concluded that the "open primary serves [a] compelling state interest"

and that "[u]pon this issue, the Wisconsin Supreme Court may well be correct." Id. at 121, 101 S.Ct. at 1018. [FN14] Perhaps the closest case is Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), but in Tashjian the Court addressed the reverse of the situation presented here; in Tashjian the state election law provided for a closed primary and the political party desired to open its primary to independent voters. [FN15] Thus, the Court had no occasion to address either the State's interests in an open or blanket primary or the burdens imposed on a political party by such a primary system. Two State Supreme Courts—the Supreme Courts of Alaska and Washington—have examined the constitutionality of the blanket primary and both have concluded that a blanket primary withstands a party's First Amendment challenge. See O'Callaghan v. Alaska, 914 P.2d 1250 (Alaska 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1690, 137 L.Ed.2d 818 (1997); Heavey v. Chapman, 93 Wash.2d 700, 611 P.2d 1256 (1980); Anderson v. Millikin, 186 Wash. 602, 59 P.2d 295 (1936). As noted above, the Supreme Court of Wisconsin came to the same conclusion concerning the Wisconsin open primary in the face of the Democratic Party's claim that by permitting non-party members to vote in its primary, including Republicans and adherents of other parties, the State's open primary violated the Party's associational rights. See Wisconsin ex rel. La Follette v. Democratic Party, 93 Wis.2d 473, 287 N.W.2d 519 (1980).

FN14. The Court viewed the issue as "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party." 450 U.S. at 121, 101 S.Ct. at 1018. Justice Powell in dissent would have held that the open primary was supported by compelling interests that outweighed the burden on the National Party. Id. at 126, 101 S.Ct. at 1020. Justice Powell's dissent, like Justice Abrahamson's opinion for the Wisconsin Supreme

Court, discusses many of the issues relevant to this case.

FN15. The Court expressly cautioned that its holding was limited to the particular set of circumstances before it. Id. at 224 n. 13, 107 S.Ct. at 554 n. 13 ("Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership."). Nader v. Schaffer, 417 F.Supp. 837 (D.Conn.), aff'd without opinion, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976), also addressed the constitutionality of a closed primary. The court held that the State's closed primary was constitutional in the face of a challenge from two voters who wanted to vote in the primary elections without registering with a party. The court concluded that the closed primary was reasonably related to the legitimate goal of protecting the associational rights of party members.

The Supreme Court recently has explained the standard and manner of review that should be applied when a state election law is challenged by a political party on the basis of the First Amendment:

> When deciding whether a state election law violated First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less-exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable nondiscriminatory restrictions." No bright line separates permissible election-related

> regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, ___ U.S. ___, ___, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997) (citations omitted). In describing the "flexible" balancing test now used by the Court, the Ninth Circuit has cautioned that even when "strict scrutiny," the highest standard of review, has been invoked, "its invocation in election law cases has not preordained their outcome." Lightfoot v. Eu, 964 F.2d 865, 869 (9th Cir.1992). Moreover, the Court does not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." Timmons, ___ U.S. at ___, 117 S.Ct. at 1372.

[3] In evaluating the constitutionality of Proposition 198, the court therefore must first determine the character and magnitude of the burdens imposed by the blanket primary on the associational rights of the political parties. The court then must consider the State's interests and weigh the strength of those interests against the particular burdens placed on the parties' associational rights. The greater the intrusion on the parties' associational rights, the greater must be the State's interests and the more narrowly tailored must be the Proposition to advance those interests. [FN16]

> FN16. Defendants stress an argument that must be addressed at the outset. Defendants argue that because a majority of the members of the Democratic and Republican parties, and presumably of the minor parties, voted for Proposition 198, the membership of the parties have consented to Proposition 198 and therefore there is no issue for the court to resolve. There are three problems with this argument. First, even though the polls appear to be accurate, those polls do not report the votes of minor party members. It is only by inference that it can be concluded that minor party members also supported Proposition 198. Moreover,

and second, even if the polls are accurate, this is not the way in which decisions customarily are made in our democracy. In no other context do we accept the results of polling for the act of voting. Finally, the parties have selected certain procedures for the modification of their rules. These procedures require deliberation and decisionmaking by the parties' respective central committees. Other deliberative bodies have similar procedural rules. Such rules may affect the nature of the debate—indeed, may cause there to be debate—and may affect the outcome of the decision. We would not accept a poll of legislators as the equivalent of a legislative vote. For much the same reason, a poll of voters is not the equivalent of a decision by a party according to the procedural rules of the party. The court therefore rejects the argument that the "parties," defined as the electorate, have agreed to Proposition 198 and that this lawsuit is merely an attempt by dissidents to carry on intra-party disputes that they previously lost at the ballot box. For an interesting discussion of "who gets to speak for 'the party'," see Daniel H. Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry 71 Tex. L.Rev. 1741, 1777 (1993).

III.

The parties' main argument is that a blanket primary permits voters who are not members of a particular party—who may indeed be hostile to that party's electoral interests—to vote in that party's primary and thus to participate in the process by which the party defines its positions on a variety of issues and by which it chooses its standard bearers. In Tashjian the Supreme Court recognized the importance of these interests in invalidating a Connecticut statute that forbade the parties from permitting non-members from voting in their primaries:

> [T]he freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' ... The statute here places limits upon the group of registered voters whom the Party may invite to participate in the basic function' of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Tashjian, 479 U.S. at 215-16, 107 S.Ct. at 548-49 (citations omitted). Accord Timmons v. Twin Cities Area New Party, ___ U.S. ___, ___, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997) ("the New Party, and not someone else, has the right to select the New Party's standard bearer' ").

A.

[4] [2] The parties contend that their interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how Proposition 198 will work in practice, the blanket primary must be unconstitutional on its face. Yet while the interest in determining who will vote in a party's primary is one protected by the First Amendment, and is undoubtedly an important interest, this is not the end of the inquiry. If it were, then open primaries would also be unconstitutional upon any party's objection: an open primary, every bit as much as a blanket primary, permits voters who are not registered in a party to vote in that party's primary. But many of the States have some version of an open primary and to invalidate them all on this theoretical ground would be an extraordinary intrusion into the complex and changing election laws of the States and would remove from the American political system a method for candidate selection that many States consider beneficial and which in

the uncertain future could take on new appeal and importance. [FN17]

> FN17. The expert witnesses in this case differ as to how many of the States have open primaries or some feature of an open primary. Part of this dispute depends on how to classify those States that treat a voter's request for a ballot as tantamount to a declaration of party affiliation. Even if this patent fiction were accepted, close to half of the States permit voters who are not members of a particular party, and who may be independent or, in some States, members of other parties, to vote in that party's primary election. Moreover, as Justice Powell noted, when a voter may register immediately before voting at the primary, "the difference between open and closed primaries loses its practical significance." Democratic Party, 450 U.S. at 132, 101 S.Ct. at 1024 (Powell, J., dissenting).

[5] Similarly, were the parties' power to determine membership and to select their nominees unfettered, then the States would also lack power to prescribe candidate selection through a primary election or to require that all voters who have met a State's registration requirements be permitted to vote in the parties' primaries notwithstanding any other membership requirement that a party might impose. [FN18] However, the States have considerable regulatory authority over the process of candidate selection and may require that the parties select their candidates by a primary election open to registered voters. See Lightfoot v. Eu, 964 F.2d 865, 871 (9th Cir.1992) ("political parties' rights to nominate whomever they want, however they want, is not sacred"); Timmons v. Twin Cities Area New Party, ___ U.S. ___, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (State can prohibit fusion candidacies). The States' authority over the political parties stems in part from the Constitution, Art. I, 4, cl. 1, and in part from the public function that the political parties perform in the candidate nominating and political processes.

> FN18. The most dramatic example of government control of a political party's membership requirements are the White Primary Cases in which the Supreme Court held that the Democratic Party of Texas could not exclude black voters from its primary. See Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). An interesting example of how a party's desire to limit its membership could conflict with state law is suggested by the testimony of plaintiff Gail Lightfoot, a member of the State Executive Committee of the Libertarian Party: "You become a member of the Libertarian Party by joining, by asking. It's a request to become a member. And you pay dues and sign a pledge [of nonviolence]. In California, because of state law, state law says that all registered voters that take the name Libertarian are members of the party. But we consider pledge-signing individuals who have paid their dues and signed the pledge to be the true members of our party." R.T. at 153-54; see also R.T. at 179 (Peace and Freedom Party confers party membership on persons who are "deprived of the right vote by the State of California because of age, citizenship, or prior social behavior").

Moreover, the analogy on which the parties rely so heavily, the analogy between the political parties and the myriad of private political, charitable, recreational, educational or religious associations at the center of American life, is imperfect at best. The political scientists who testified in this case agree that a political party cannot be described simply as a private club or association; instead, a political party has three distinct aspects—the party in the electorate, the party organization, and the party in government. [FN19] Unlike other private associations, at least in one of their avatars— the party in government—the political parties are very like the government itself. See Lowenstein, supra, at 1757 ("unlike any other private groups, political parties routinely, pervasively, and legitimately exercise their influence from within the

government"). And the parties perform functions that are fairly characterized as governmental in nature, such as the nomination of candidates.

> FN19. See Pls.' Ex. 6, Cain Report, at 15 ("Since the seminal work of the scholar V.O. Key, parties are thought to consist of three components: the party in government, the party in the constituency and the party as organization."); Lowenstein, supra, 71 Tex. L.Rev. at 1760 (1993) ("Although there have been a great many typologies of the varying 'locations' and functions of parties, probably the most common identifies three: the party in the electorate, the party organization, and the party in or running for public office ... The very fact that references to 'the Democrats' and 'the Republicans' are more common in ordinary conversation than references to the Democratic party' and 'the Republican party' testifies to the loose and manifold nature of our concept of 'party.' ").

Furthermore, at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations. The major political parties in this country " 'have been characterized by a fluidity and overlap of philosophy and membership.' It can hardly be denied that [the parties] generally [have] been composed of various elements reflecting most of the American political spectrum." Democratic Party, 450 U.S. at 133, 101 S.Ct. at 1024 (Powell, J., dissenting) (citations omitted). And, as discussed above, the term "party member" as applied to registered voters is something of a misnomer. The States determine who will vote at primary elections—registered voters. See Cal. Elections Code §§ 2151, 7164, 7362, 7804, 8001. These voters have not allied themselves to a political party in the customary way that one normally becomes a member of a private association; they have not paid dues, taken an oath, expressed agreement with certain ideals or goals, attended meetings, accepted any obligations, or attended upon any other rite of initiation. The

parties do not and could not insist upon more than mere registration as the price of voting in the primary elections. [FN20] Thus, to contend that Proposition 198 permits non-party members to vote in a party's primary, while accurate, covers over much of the imprecision in the political reality.

> FN20. "[T]he essence of the legal definitions of party membership in the United States will surely continue to be self-designation. The fact remains that today even in Illinois, New York, or any other closed-primary state you are a Democrat if you say you are; no one can effectively say you are not; and you can become a Republican any time the spirit moves you simply by saying that you have become one. You accept no obligations by such a declaration; you receive only a privilege, the privilege of taking an equal part in the making of the party's most important decision, the nomination of its candidates for public office. The only remaining restriction is that in some states, such as California, you may have to let the registrar of voters know that you have changed parties, and you may have to do so several weeks or even months before your new party's next primary. But in many closed-primary states you do not even have to do that, and in Wisconsin and the other open-primary states you are not allowed to make an official declaration of your party membership. One can only conclude that the so-called 'closed' primaries are just a hair more closed than the so-called 'open' primaries." A. Ranney, Curing the Mischiefs of Faction 166-67 (1975), quoted in Wisconsin ex rel. LaFollette v. Democratic Party, 287 N.W.2d at 510.

In short, it is necessary to look beyond the parties' claim that their constitutional interest in limiting candidate selection to their respective members necessarily prevails over any State interest and without regard to how the voters may behave under a blanket primary.

B.

[6] Turning to the more practical implications of a blanket primary, the parties contend that a blanket primary process in California will have a destructive effect on all political parties both major and minor. The parties predict that there will be widespread cross-over voting, whether benevolent or malicious, and that the consequences of this large cross-over vote will be many and adverse to the parties. The parties contend that the cross-over vote, and the prospect of a large cross-over vote, will affect the selection and behavior of party nominees and elected officials; weaken party discipline; increase the costs of primary elections by causing candidates to compete as if it were a general election; dampen the morale of party activists; and disrupt internal party structure and governance.

[7] Much of the testimony at trial was directed to the question of whether voters in blanket primary states tend to cross over in sufficient numbers to influence the outcome of elections and whether they cross over for benevolent or malevolent reasons. A cross-over voter is one who votes for a candidate of a party in which the voter is not registered. Thus, the cross-over voter could be an independent voter or one who is registered to a competing political party. [FN21] A cross-over voter may be actuated by three different purposes. First, the voter's purpose may be to vote for the voter's most preferred choice to win in the general election; this kind of cross-over voter is sometimes referred to as engaging in "sincere" voting. Second, the voter may be engaged in "strategic" voting, designed to obtain the best possible outcome, by voting for the voter's second choice in a setting where the voter's first choice, within the voter's own party, either has no apparent chance of victory at the general election or is so certain to win the party's nomination that the voter perceives that his or her vote is best spent influencing another party's primary and thus the choice at the general election. Finally, the voter may be a raider, crossing over to vote for a candidate who is perceived as the "weakest" of an opposing party's candidates

in the hopes that this candidate will win the primary only to be trounced at the general election. [FN22]

FN21. Some of the experts exclude independents from their definition of cross-over voters.

FN22. A sophisticated raider will vote for the weakest among those candidates who have a realistic chance of prevailing at the primary.

[8] The parties contend that a blanket primary will unleash a torrent of cross-over voting even by comparison to open primaries. The parties reason that unlike an open primary, a blanket primary permits a voter to cross over as to particular contested elections without losing the ability to vote in the remainder of the contests in the voter's own party. The evidence at trial suggests that the parties are correct that cross-over voting will be more prevalent after Proposition 198. Indeed, defendants can hardly dispute this point while maintaining that the State's interests are furthered by a blanket primary precisely because it facilitates cross-over voting. Nonetheless, the parties' characterization of the likely amount or effects of cross-over voting due to a blanket primary is overdrawn.

To begin with, there is little evidence that raiding will be a factor under the blanket primary. On this point there is almost unanimity among the political scientists who were called as experts by the plaintiffs and defendants. Professor Costantini, for plaintiffs, gave his opinion that

> [s]urvey evidence tends not to support any fear that raiding (sometimes characterized as "mischievous voting") will be a common phenomenon under Proposition 198. At least in open presidential primaries (the focus of almost all the relevant studies), it appears that the great majority of crossover voters—from 90% to 95% or more—invade a party's primary to vote for a

> preferred candidate and not to vote for a candidate who they will oppose in the general election and who they believe will be easier to defeat in that election.

Pls.' Ex. 7, Costantini Report, at 7; R.T. at 485-86. Professor Donald Olson of the University of Washington-Seattle, reflecting on the over half century of experience with a blanket primary in Washington, explained that the conditions for successful raiding rarely exist:

> The potential for raiding under the blanket primary generates wide media attention and spawns electioneering lore that is simply unwarranted by actual experience. Technically defined, raiding would occur where partisan voters of party X cross-over in sufficient numbers to help select the weakest or most vulnerable candidate in party Y. The requirements for this form of electoral subterfuge are: 1) the absence of a meaningful primary contest in party X; 2) provision of sufficient information to identify the weaker and most vulnerable potential opponent in party Y; 3) concerted action by a large enough bloc of voters in party X to influence the outcome in the primary of party Y; and 4) the abandonment of traditional party loyalties by partisan voters to enter the opponent's primary.
>
> In the experience of Washington state, these requirements are simply too demanding and have not been fulfilled in actual practice.

Defs.' Ex. G, Olson Report, at 6. See Pls.' Ex. 6, Cain Report, at 6-7; R.T. at 355. Given that the purpose of raiding is to weaken a competitive party's advantage at the general election, raiding is not a concern for minor parties because their candidates rarely have a chance of prevailing at the general election. Indeed, no conclusive instance of raiding in such numbers as to affect the outcome of any primary was offered by plaintiffs. [FN23]

> FN23. Professor Cain suggests that the 1974 Alaska Gubernatorial Republican primary may be an example of raiding in which Democrats and Independents "raided" to support liberal Republican Jay Hammond over former Governor Walter Hickel. However, as Professor Cain notes, the cross-over voters may have been "liberal shoppers" as opposed to saboteurs. See Pls.' Ex. 6, Cain Report, at 7.

As to benevolent cross-over voting, the evidence suggests that there will be particular elections in which there will be a substantial amount of cross-over voting—perhaps as high as 25% of the vote for that office—although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states. There will be a small number of elections in which the cross-over vote proves decisive, and there will be other elections in which the possible importance of the cross-over vote will be an influence on the conduct of the primary campaign and the conduct of elected officials.

The experience in Washington suggests that as to the election for any particular office, approximately 10% of the voters are cross-over voters, excluding independents, while in some exceptional cases this figure may rise as high as 20-25%. R.T. at 511. [FN24] Typically the cross-over vote in Washington does not change the result of an election but only the margin of victory. R.T. at 513. Moreover, the amount of cross-over voting is greater in a blanket primary than an open primary but not dramatically so. According to Professor Nagler, who co-authored the most comprehensive study of patterns of cross-over voting presented at the trial, the average cross-over rate, excluding independents, is something on the order of 5% of voters in closed primary states, [FN25] 10% of voters in open primary states, and 11-15% in blanket primary states. R.T. at 780, 788; Defs.' Ex. H, Alvarez and Nagler Report, at 11-12. The study concludes that "crossover voting in blanket primaries is not dramatically higher than in other types of

open primary systems" and that "there is very little crossover voting in general in primary elections in the United States." Id. at 35-36. [FN26]

FN24. According to Professor Olson, approximately 25-33% of voters vote for candidates of only one party throughout the ballot, voting a straight ticket. The remainder of the voters cross over at least once.

FN25. In a closed primary state, a cross-over voter is one who identifies with one party but decides to register in another party for the purpose of voting in the primary of that other party.

FN26. Plaintiffs fail to present substantial or convincing evidence that the minor political parties will be affected by cross-over voting to any significant degree. A strategic voter would not cross-over to vote in a minor party's primary because the victor of the minor party primary will not likely be the winner in the general election. Moreover, the minor parties rarely have contested primaries. R.T. at 167, 618, 630-31. Finally, the minor parties make much of their small turn-out at the primary election compared to the much larger numbers of voters who select their candidates at the general election. From this disparity, the minor parties argue that they will be swamped at the primary election by the same non- party members who vote for their candidates at the general election. This conclusion does not follow. Those non-party members who vote for minor party candidates at the general election are most likely voters whose preferred candidates were not selected in the primary of a major party. R.T. at 193.

[9] Although cross-over voting typically does not change the outcome of a primary and may not be much greater in a blanket than in an open primary, it is probable over time that

there will be some elections under Proposition 198 that will be decided by the cross-over vote. Cross-over voting is most likely to occur when one party's primary is competitive while the other party's primary is not. When this condition of "asymmetric competition" occurs, voters of the party with the noncompetitive primary may cross over to the other primary to influence the choice. The incentive to cross over will be particularly high if the winner of the other party's primary is almost certain to win at the general election. See Pls.' Ex. 6, Cain Report, at 8. Every two years in California there are 80 Assembly races, 20 State Senate races, and 52 Congressional races. Examining the 1996 Assembly primaries, Professor Cain identified ten races in which there were asymmetric competitive conditions. In some of these races, a cross-over rate of 5% could have changed the outcome of the election had all of the cross-over voters voted for the same candidate. Given that in Washington, cross-over rates occasionally reach levels as high as 20-25%, and that the cross-over rate in California could be higher than Washington, [FN27] it is likely that in the fullness of time some California primary races will be decided by cross-over voters, even if the number of such occasions is not large. Depending on the circumstances, the swing of even one seat could give a legislative majority to one party.

FN27. See R.T. at 574. Whether cross-over rates in California will be similar to those in the other blanket primary states is necessarily a matter of conjecture.

[10] Furthermore, the possibility of a decisive cross-over vote-whether or not that vote materializes—could well affect the conduct of elections and elected officials. Under a blanket or open primary, the primary election becomes similar to the general election. Candidates will perceive a need or opportunity to attract support from the entire electorate, not simply from members of their respective parties. This will affect not only the cost of the primary—which is likely to increase, see R.T. at 270—but may affect the positions that candidates take

on political issues as they seek to attract cross-over voters. Moreover, once elected, candidates may perceive that the cross-over vote makes them less vulnerable at the primary to the wrath of the party organization or party regulars for acts of apostasy. A blanket or open primary weakens the "disciplining effect" of the primary challenge in requiring "the officeholder [to] carry out the party philosophy and support the majority position of the party caucus." R.T. at 214. The corollary to this loss of discipline is a loss of power to party activists such that the ardor of party volunteers and activists may be dampened in a system that permits non- party members to exert influence over the party's selection of a candidate. This has been the experience in Washington and is likely to occur in California. See R.T. at 558; R.T. at 18; R.T. at 989-990.

[11] Finally, the parties argue that their internal governance will be disrupted by the blanket primary and the cross-over vote. Although Proposition 198 specifically exempts party committee positions from the blanket primary, both the Republican and Democratic Parties permit officeholders and nominees to appoint members of their governing bodies, the Democratic State Central Committee and the Republican State Central Committee. Because nominees may have been selected by non-party members, and because the nominees in turn choose members of the Central Committees, the parties contend that their governing body may be adulterated. Further, the parties warn that their respective national organizations may not accept the results of the California presidential primary, if that primary is a blanket primary, with the result that the parties may be forced to hold a nominating convention or caucus. Neither of these contentions is particularly forceful, however. As to membership on the Central Committee, the parties are free to change their selection process if they wish. Moreover, both parties already give more positions on the Central Committee to successful candidates; yet these successful candidates are precisely those who have appealed more broadly across party lines. R.T. at 9, 224. As to the

national nominating conventions, the California parties may be forced to adopt a different procedure for delegate selection other than the presidential primary or they may receive a waiver from their national organizations such as Wisconsin eventually received from the Democratic Party. R.T. at 123, 145. This is a choice for the parties to make, and they can do so as they please without interference from the State.

C.

[12] The magnitude of the burdens imposed on the parties by Proposition 198 are not fairly characterized either as "severe" or as "negligible," the two labels most often applied in the caselaw at this juncture of the analysis. The burdens are not negligible. State law requires each party to select its candidate through a primary, and the winner of the primary will be the party's nominee. The blanket primary wrests a measure of control of the primary process from the party and its members. This is its purpose. The party may still endorse a candidate and may throw financial support to a particular candidate. And, in the typical election, the cross-over vote will not be decisive. Yet by permitting non-party members to vote in a party's primary— even granting the uncertainty of the label "party member"—Proposition 198 is an intrusion on a party's traditional right to select its own candidate. In this respect, the blanket primary is no different from an open primary although the practical effect of a blanket primary on the selection process may be somewhat greater than an open primary. In addition, a blanket primary, like an open primary, may depress the vigor and morale of party activists and may affect the ability of the party to discipline errant legislators.

[13] On the other hand, the burdens on the parties due to Proposition 198 are not likely to prove severe or debilitating. The Washington experience, as well as that of the many open primary states, suggests that Proposition 198 will not diminish the efficacy or strength of the political parties in California by any substantial degree. [FN28] Indeed, a study of the political

parties in the 1970's and 1980's in 13 western states, including Washington and California, concluded that the political parties in Washington were the most competitive with one another of all 13 states. R.T. at 524; see Tashjian, 479 U.S. at 223 n. 12, 107 S.Ct. at 553 n. 12 ("dire" predictions as to decay of parties not borne out by the 29 States that have open primary features). Both the Democratic and Republican Parties continue to be strong political parties in Washington, and can be expected to operate with little diminution in their effectiveness in California. [FN29] The parties do not show that the blanket primary is significantly different theoretically or practically from the open primary. Nor do they show or even contend that Proposition 198 has any discriminatory purpose or effect. Thus, the burden imposed by a blanket primary falls evenly on all of the parties whatever their size or ideology. Finally, Proposition 198 leaves untouched the wide field of party endeavor that is not directed specifically to the primary, activities such as developing the party platform, registering new voters, and getting out the vote on election day. Defs.' Ex. I, Quinn Report at 18.

FN28. Professor Cain would not expect a blanket primary to be so debilitating to the parties that it should be removed as an option altogether even if the parties were in favor of it. R.T. at 457. Professor Cain's greatest concern is to protect party autonomy.

FN29. According to Professor Olson the Washington Republican Party has been ranked as among the strongest Republican parties in the nation. Professor Olson states that the Washington Republican Party "is alive, it is healthy, it is well, it is vigorous. It is the single most important institution for recruiting candidates to run for office. It's the single most important institution for endorsing candidates. It is the most important fundraising institution in the conduct of elections." R.T. at 527. According to Professor Olson although the Washington Democratic Party is not so

dynamic as its competitor, it is still of above average organizational strength as compared to the Democratic parties of the 50 states. R.T. at 528.

[14] In light of all of these considerations, the court finds that the parties have succeeded in showing that the blanket primary imposes a significant but not severe burden on their associational rights. To survive the challenge mounted by plaintiffs, Proposition 198 must be supported by interests that are sufficient to outweigh the burdens identified above. Those interests need not be compelling, given that the burdens are not crushing, but they must be important.

IV.

[15] The States have broad regulatory authority over the conduct of elections including primaries. [FN30] The primary election is the critical first stage in the electoral process: "The direct primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers." Storer v. Brown, 415 U.S. 724, 735, 94 S.Ct. 1274, 1281, 39 L.Ed.2d 714 (1974). "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the political parties] have been made." Morse v. Republican Party, 517 U.S. 751, ___, 116 S.Ct. 1186, 1199, 134 L.Ed.2d 347 (1996) (citation omitted).

FN30. "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of

> voters, and the selection and qualification of candidates." Storer v. Brown, 415 U.S. 724, 729-30, 94 S.Ct. 1274, 1278-79, 39 L.Ed.2d 714 (1974).

Proposition 198 is the latest development in a history of political reform measures that began in the Progressive Era. "The Progressives believed democracy should be something greater than competition between political parties." Lightfoot v. Eu, 964 F.2d at 872. The Progressives sought to diminish the importance of the parties and "party bosses" by establishing nonpartisan local elections, a comprehensive civil service system, direct legislation through the initiative and referendum, and the cross-filing system by which members of one party could run in the primary of the other party. See Defs.' Ex. I, Quinn Report, at 7 (quoting J. Owens and E. Costantini, California Politics and Parties (1970)). [FN31] The cross-filing system is of particular note because in practice it bore some resemblance to a blanket or nonpartisan primary system. [FN32]

> FN31. Lowenstein contrasts the Progressives' "vision of a democracy purged of corruption by placing widely dispersed power in the hands of common men and women" with the views of "party renewal advocates" who believe in autonomous, strong, cohesive political parties who engage in "responsible party government" much on the European parliamentary model. See Lowenstein, supra, 71 Tex. L.Rev. at 1761-71, 1791. The debate in this case has been framed by the experts in similar terms.

> FN32. Under the cross-filing system, "[a] candidate registered in one party may seek the nomination of all parties at the primary. If he fails to secure the nomination of his own party, he cannot be the candidate of any party at the general election." Jones v. McCollister, 159 Cal.App.2d 708, 324 P.2d 639 (1958). Under the cross-filing system voters registered to different parties had the opportunity to vote for the same candidates. According to Dr. Quinn, as the system worked in California, the winner of one party's primary tended to be the winner of the other party's primary as well:

> The cross filing system existed in California from 1911 to 1959. Under this system, a legislator or member of congress could file to run in both the Democratic and Republican primaries, and so long as he or she won their own party nomination, they would win the nomination of the other party as well.... On the general election ballot, the winners, usually incumbents, are shown as the nominees of both parties.
>
> Defs.' Ex. I, Quinn Report, at 7.

[16] Defendants advance a number of State interests furthered by Proposition 198. All of the various interests, however, reduce to one fundamental contention: according to defendants, Proposition 198, like other Progressive Era reforms, enhances the democratic nature of the election process and the representativeness of elected officials.

[17] Defendants stress that a blanket primary opens up the candidate selection process to two types of arguably "disenfranchised" voters—independents and minority party voters in safe districts. In a blanket primary, independent voters will be able to participate in framing the choice that they will ultimately have to make in the general election. Approximately 11% of the electorate in California are registered as independents, and the proportion of independent voters is growing rapidly. R.T. at 940. Moreover, many California voters reside in "safe districts," districts in which one party is dominant. [FN33] Voters in these districts who belong to the minority party have no influence or voice because the general election is decided as a practical matter in the primary of the dominant party. Of 15.6 million registered voters in Califor-

nia, approximately one quarter are "disenfranchised" in this way. R.T. at 854. Defendants suggest that the inability of these voters to influence the outcome of the election in their districts leads to the election of representatives who see no need to represent these voters or to pay heed to their interests. Of course, such voters could register in the majority party, but this would require them to give up their current party or independent registration.

> FN33. According to Dr. Quinn, "A district could be considered safe if it had not been contested between the parties since it was created in the 1991 reapportionment; the area covered had been historically one party in its voting ...; there was no significant money spent in the election between the two parties in '94 and '96 ...; and if the incumbent received more than 55 percent of all of the votes cast in the election." R.T. at 847- 48.

Apart from the exclusion of independents and minority voters in safe districts, defendants contend that the closed primary gives undue power to party members and loyalists, including incumbent elected officials, such that the voters in the general election are presented with candidates who are more partisan and who take positions on the policy issues of the day that are not representative of the majority of the electorate. See R.T. at 243, 269, 299, 857. Defendants note that turnout is low at primary elections, and thus that a minority of more partisan party members, influenced by the endorsements of party leaders, determine the choice for the much larger group of all voters at the coming general election. Defendants suggest that this skewing of the process toward partisan candidates leads to legislative impasse and thus alienation of the electorate from the political system. Defendants contend that candidates who would command majorities at the general election are unable to prevail at the primary such that the voters at the general election are forced to pick among candidates none of whom is the first choice of the majority of

voters. R.T. at 255-256. Although these assertions are not readily susceptible of proof, many are not contested, [FN34] or are supported by persuasive opinion evidence from defendants' experts. See, e.g., R.T. at 954-963, 974-975. Furthermore, these contentions are clearly stated in the ballot pamphlet, and it is a fair inference from the margin of support that the people of California agree that a blanket primary system will lead to the election of more representative "problem-solvers" who are less beholden to party officials and "special interest groups." While political scientists may disagree on the question of whether the political system is benefitted when parties are more or less distinct or polarized, it is apparent that the voters have sided with less partisanship in adopting Proposition 198. [FN35]

> FN34. There is some evidence that elected officials from blanket primary states are closer to the views of the electorate as a whole than officials from closed primary states. See Defs.' Ex. E, Gerber Report, at 11. Some of plaintiffs' experts apparently would agree that candidates selected in a blanket primary are likely to take less partisan or extreme positions than those selected in a closed primary. They do not concede that this is healthy, however, because they believe that the system is benefitted by greater partisanship and greater distance between the parties.

> FN35. There is some suggestion in defendants' brief that the blanket primary will also make the parties more representative and therefore will benefit and strengthen the political parties. Defs.' Post-Trial Brief at 45. The Supreme Court has given little weight, however, to State interests couched in terms of what is good for the parties. The Court has found that it is for the parties to decide what is in their interest. See Tashjian, 479 U.S. at 222-24, 107 S.Ct. at 552-53; Eu v. San Francisco County Democratic Cent. Comm.,

489 U.S. 214, 227-28, 109 S.Ct. 1013, 1022-23, 103 L.Ed.2d 271 (1989).

Defendants also argue that representativeness and democratic participation are benefitted by the higher voter participation expected in a blanket primary election. Voter participation in primary and general elections in California has declined markedly over the past two decades. R.T. at 658. Turnout rates in blanket primary states have been higher than in California, and there is reason to expect that by providing more choice, the blanket primary may encourage more voters to participate at the primary election. Similarly, defendants contend that elections will be more competitive under the blanket primary, again leading to an increase in voter interest and participation. Although the empirical case for the assertion that blanket primaries are more competitive than other primaries is not conclusive, there is reason to expect some increase in the number of candidates, the closeness of elections, and, therefore, voter turnout.

Finally, defendants point to one interest—voter privacy—that does not fit neatly under the representativeness or participation headings, although it is possible that greater privacy could lead to greater participation. Defendants note that a blanket primary protects voter privacy by permitting voters to participate in the primary election without publicly declaring a party affiliation as is the case in closed primary states and in some open primary states.

V.

[18] [3] Taken as a whole the State's interests that support the blanket primary are substantial, indeed compelling. There is a "substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community." Storer v. Brown, 415 U.S. 724, 729, 94 S.Ct. 1274, 1278, 39 L.Ed.2d 714 (1974). In attempting to reduce partisan strife, Proposition 198 is similar to other measures adopted by the States to deal with the problem of factionalism, a problem that deeply troubled the framers of the Constitution. See The Federalist No. 10 (Madison). A State's interest in ameliorating "unrestrained factionalism" is a compelling one. Increasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in the primary process are all interests of the first order. See Lightfoot v. Eu, 964 F.2d 865, 872 (9th Cir.1992) (State's interest in a direct primary is compelling). The voters' belief in the fairness of the electoral process is also a substantial state interest; it is apparent that the voters of California believe that the system is fairer when all voters, including independents and regardless of party affiliation, may participate in framing the choice of candidates at the general election. And while the parties argue that there are other ways to increase voter turnout, the fundamental goal of enhancing representativeness by providing all voters with a choice that is not predetermined by party members alone can only be advanced by the blanket primary. Unlike Tashjian in which the Democratic Party controlled the legislature and attempted to tell the Republican party who could vote in its primary, and where the State's purported interest in a closed primary was to protect the parties from disruption from without, Proposition 198 is a non-discriminatory measure that was adopted by a clear majority of voters, with a convincing margin from both major parties, and which advances interests that are uniquely those of the State and its electorate as opposed to the parties. These interests outweigh the also substantial interest that the political parties have in controlling who votes in the primary.

In reaching this conclusion, the court does not decide whether a blanket primary is a good idea; it may prove to be a bad idea, in which case the people of the State presumably will act to reform the system in the future as they have in the past. Nor does the court decide whether the voters were correct in concluding that a more representative and participatory

system is desirable at this time in the State's history or whether it is wise to weaken the parties by some degree to further the goals of representativeness and participation. These important questions are for the people of the State to decide.

Each of the States has its own experiment in democratic government. The history of election law is one of change and adaptation as the States have responded to the play of different political forces and circumstances. There is little reason to expect that the future will be any different. The court concludes that a blanket primary serves sufficiently weighty interests that the State of California should not be precluded from ever trying such a procedure.

Judgment is awarded to defendants.

IT IS SO ORDERED.

APPENDIX B — ORDER AND AMENDED MEMORANDUM OF OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED AND FILED NOVEMBER 24, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-96-2038 DFL

CALIFORNIA DEMOCRATIC PARTY, ART TORRES, KATHY BOWLER, PAUL JORJORIAN, PEACE AND FREEDOM PARTY, C.T. WEBER, LIBERTARIAN PARTY OF CALIFORNIA and GAIL LIGHTFOOT,

Plaintiffs,

v.

BILL JONES, Secretary of State
of the State of California,

Defendant.

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER, SHAWN STEEL, and DONNA SHALANSKY,

Intervenors/Plaintiffs,

CALIFORNIANS FOR AN OPEN PRIMARY,

Intervenor/Defendant.

Appendix B

ORDER

The Memorandum of Opinion filed November 17, 1997 is ordered amended as follows:

1. Page 9, note 10, line 21½: omit "(Gerber *Report*)";

2. Page 13, line 1: replace "state's" with "State's";

3. Page 17, note 17, line 18: insert a comma after "Justice Powell noted";

4. Page 26, line 14: omit "or uncontested";

5. Page 36, note 34, second sentence, at line 24½: replace "blanket" with "closed." The sentence shall read: "some of plaintiffs' experts apparently would agree that candidates selected in a blanket primary are likely to take less partisan or extreme positions than those selected in a closed primary";

6. At page 40, lines 13-15: replace lines 13-15 with "Judgment is awarded to defendants."

IT IS SO ORDERED.

Dated: 24 November 1997.

s/ David F. Levi
DAVID F. LEVI
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-96-2038 DFL

CALIFORNIA DEMOCRATIC PARTY, ART TORRES, KATHY BOWLER, PAUL JORJORIAN, PEACE AND FREEDOM PARTY, C.T. WEBER, LIBERTARIAN PARTY OF CALIFORNIA and GAIL LIGHTFOOT,

Plaintiffs,

v.

BILL JONES, Secretary of State
of the State of California,

Defendant.

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER, SHAWN STEEL and DONNA SHALANSKY,

Intervenors/Plaintiffs,

CALIFORNIANS FOR AN OPEN PRIMARY,

Intervenor/Defendant.

AMENDED MEMORANDUM OF OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appendix B

In March of 1996, the people of the State of California, by a wide margin, adopted Proposition 198, an initiative statute known as the Open Primary Act. Proposition 198 converts the State's primary election from a closed to an open or blanket primary in which voters may vote for any candidate regardless of the candidate's or the voter's party affiliation. In a blanket primary under Proposition 198, one ballot will be prepared at the primary election for all voters just as in the general election. Because a blanket primary permits voters to vote in the primary election of a party without being registered in that party, the political parties and party officials who bring this action contend that Proposition 198 violates their right of association guaranteed by the First Amendment of the Constitution.

The court concludes that Proposition 198 withstands this constitutional challenge.

I.

Under Proposition 198 "All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation."[1] By this language and the conforming amendments to the State Election Code, Proposition 198 changed the California primary from a closed

1. Proposition 198 added to the Election Code the language quoted in text as a new § 2001. The Proposition also made conforming amendments to §§ 2151, 13102, 13203, 13206, 13230, 13300, 13301, and 13302. *See* Defs.' Ex. A.

Appendix B

to an open or blanket system.[2] As the Legislative Analyst explained in the ballot pamphlet distributed to voters before the election, under the closed system "[i]n order to vote in primary elections for partisan offices, a voter must have identified a political party affiliation when registering to vote and can vote only for candidates of that party." Defs.' Ex. A at 5. Thus, for example, in the closed primary a registered Democratic Party voter receives a ballot that includes only candidates competing for the Democratic Party nomination. Only registered Democrats could vote for these candidates, and the winner of the primary would be the Democratic Party's candidate at the general election.[3] By contrast, the Legislative Analyst explained, in the blanket primary instituted by Proposition 198:

> [A]ll persons who are entitled to vote in primary elections, including those not affiliated with a political party [are allowed to] vote for any candidate regardless of the candidate's political

2. California has had a closed primary since 1909 when the State substituted direct nomination of candidates by primary elections in place of nominating conventions held by the political parties. In 1900 California briefly experimented with a blanket primary, but the California Supreme Court held it unconstitutional under the State Constitution. *See Britton v. Board of Election Comm'rs*, 129 Cal. 337, 346-47 (1900). No claim is made under the State Constitution in the present case.

3. Cal. Elec. Code § 15451 provides: "The person who receives the highest number of votes at a primary election as the candidate of a political party for nomination to an office is the nominee of that party at the ensuing general election."

> party affiliation. Thus, voters in primary elections would be allowed to vote for candidates across political party lines. Furthermore, the initiative provides that county elections officials prepare only one ballot for all voters. The candidates for an office would be listed randomly on the ballot and not grouped by political party affiliation. The candidate of each political party who receives the most votes for a state elective office becomes the nominee of that party at the next general election.

Defs.' Ex. A at 5. Therefore, in the blanket primary after Proposition 198, a registered Democratic Party voter, for example, could vote for a Republican Party candidate for Governor and a Democratic Party candidate for Assembly, and so on down the ballot. An independent voter could do the same.[4] Through such cross-over voting, it is possible under the blanket primary for independent voters and voters registered in one party to participate in the primary election of another party.

In the statement of support included in the ballot pamphlet, proponents of Proposition 198 argued that the closed primary "favors the election of party hard-liners, contributes to legislative gridlock, and stacks the deck against more moderate problem-solvers." The open primary would permit voters to vote "for the best candidate for each office, regardless of party affiliation" thereby giving voters greater choice. In addition, according to proponents, the blanket

4. The election of political party committee members is not affected by Proposition 198. As to these party offices, voters may only vote for candidates of their own party registration.

primary would increase voter participation in the primary election, restore healthy competition particularly in "safe" legislative districts in which one party clearly dominates, make elected officials more responsive to voters as opposed to party officials, reduce the power of special interest groups, and strengthen the political parties by assuring the nomination of candidates with broader bases of support. Opponents of Proposition 198 contended that it would work an unconstitutional interference with the right of the parties to choose their nominees: "Allowing members of one party a large voice in choosing another party's nominee — which Proposition 198 would do — is like letting UCLA's football team choose USC's head coach!"[5] According to the opponents, the existing closed primary provided a "real choice" among candidates of different parties while a blanket primary would be "an invitation to political mischief" by special interests and political consultants. Defs.' Ex. A at 6-7.[6]

At the election, Proposition 198 was adopted by a convincing margin of those voting — 59.51 percent

5. "Should Democrats be allowed to nominate Republican candidates for office? No! Should Republicans be allowed to nominate Democratic candidates for office? No!" Defs.' Ex. A at 7.

6. In light of the arguments for and against presented in the ballot pamphlet, it cannot fairly be argued that the voters were misled or inadequately advised as to the effects and purposes of Proposition 198. *Compare Jones v. Bates*, No. 97-15914, 1997 WL 629803 (9th Cir. Oct. 7, 1997), *reh'g granted*, 1997 WL 701200 (Nov. 4, 1997) (majority of panel concludes that voters were not adequately advised as to effect of Proposition 140, the term limit initiative).

(3,340,642 votes) to 40.49 percent (2,273,064 votes). According to reliable exit polls, Proposition 198 was supported by 61 percent of Democrats, 57 percent of Republicans, and 69 percent of Independents. The measure was supported by a majority of every demographic subgroup, including groupings by sex, age, race, education, political ideology, income, religion and party identification. Defs.' Exs. B & D. Proposition 198 commanded majorities in every county in California and in 75 of the 80 Assembly districts. Defs.' Ex. I. Although the turnout by California's six minor parties was too small to sample, given the broad public support for Proposition 198 among all groups of every sort, it is likely that a majority of the members of these parties also favored the initiative. R.T. at 847 (Testimony of Thomas Quinn). Moreover, the vote on Proposition 198 reflects the long-standing support for an open primary among California voters. According to Mervin Field, an eminent California political polling expert, Californians have favored an open primary by wide margins since at least 1983. *See* Defs.' Exs. L-2 & L-5.[7]

By passing Proposition 198, California joined a small group of states, consisting of Alaska, Louisiana, and Washington, who also have blanket or nonpartisan primary elections. The other states have either a closed or an open

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7. Mervin Field testified at the trial to his conclusion that as to Proposition 198 "there was remarkable consistency over a 13-year period, and that when the vote on Prop 198 was in, comparing that with the study that we did then 13 years prior, it showed that this concept, as it's posed here, and as it was posed in 198, struck a deep-seated chord with the voting public." R.T. at 645.

primary, or some variant of the closed or open primary.[8] In the classic closed primary, such as California had prior to Proposition 198, participation in a party's primary election is limited to voters who have registered as members of that party a specified period of time prior to the primary election. Fifteen states have closed primaries of this kind. *See* Defs.' Ex. E, *Gerber Report*, at 2-4. Eight additional states have a "semi-closed" primary: participation in a party's primary is limited to those who have registered as party members *and* independents. *Id.* Participation of registered members of other parties is not permitted.

In an open primary, a registered voter may request, on election day, the ballot for any party's primary in which the voter intends to vote, whether or not the voter previously has registered as a member of that party; however, the voter may only vote in one party's primary election. Twenty-one states have an open primary in this sense of the term. *Id.*[9]

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8. "The distinctions between open and closed primaries are easy to exaggerate. Too simple a distinction ignores the range of nuances and varieties within the closed primary states." F. Sorauf, *Party Politics in America* 206 (4th ed. 1980), *quoted in Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 133 n.8 (1981) (Powell, J., dissenting). Similarly, there are many variations within the open and blanket primary states.

9. The open primary is sometimes defined more narrowly to include only those primaries in which the " 'voter is not required to declare publicly a party preference or to have that preference publicly recorded.' " *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 112 n.4 (1981) (citation omitted). Approximately ten states have this kind of open primary. *See* Pls.'

(Cont'd)

Finally, four states have blanket or nonpartisan primaries. The blanket primary is a version of the open primary in which the voter is not limited to the ballot of any single party. All voters receive the same ballot, and a voter is not limited to the candidates of any single party but may vote, as to each office contested, for any candidate regardless of party affiliation. This is the primary system in Washington and Alaska, and is the system adopted by Proposition 198. Alaska first adopted a blanket primary in 1947 and has had a blanket primary since that time with the exception of the period from 1960 to 1966 when it adopted a traditional open primary. Washington has had a blanket primary continuously since 1935. Finally, Louisiana has a version of a blanket primary, a nonpartisan primary open to all registered voters. Similar to the blanket primary in the sense that a voter can vote for any candidate without regard to party affiliation and is not limited to one party's nominees, the nonpartisan primary differs because "[t]he two top vote receivers, regardless of party, meet in a subsequent (runoff or general) election." *Id.* at 3.

"The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century and no consensus has as yet emerged." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 222 (1986). It

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(Cont'd)
Ex. 7, *Costantini Report* at 3; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 222 n.11 (1986). The other states follow practices that are sometimes classified as "semi-open" or "semi-closed." In these states the voter is permitted to request any party's ballot the day of the primary, but some record of the request is made or a public statement of party affiliation is made prior to voting.

is apparent from this very case that the States continue to debate the question and to try new approaches.[10]

All of the four political party plaintiffs in this case have bylaws that prohibit persons who are not registered in their parties from voting in their parties' primary. Article X, § 8 of the By-Laws & Rules of the California Democratic Party states that "No person shall be entitled to vote for a Democratic candidate at a partisan primary election unless he or she is a registered Democrat." Pls.' Ex. 1 at 36. The Republican Party also disputes the legitimacy of an open or blanket primary: "The [State Central] Committee shall recognize only those partisan nomination processes under California law that limit the electorate for partisan nomination elections to registered Republican voters, and which do not impose upon the Committee, without its express concurrence, a nomination process open to voters registered in other parties or as decline to state." Defs.' Ex. S at 2. The Peace & Freedom Party State Central Committee By-Laws

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10. When the Supreme Court decided *Tashjian* in 1986 it found that 21 states provided for the classic closed primary. According to Professor Gerber, as of 1990 the number of closed primaries had fallen to sixteen, including California. *See* Defs.' Ex. E., *Gerber Report*, at 2. Because it is not easy to classify the differing systems and because analysts use somewhat different definitions of the "closed" and "open" primaries, this change in numbers may be more the product of differing classification systems than changes in the states' election laws. The *Tashjian* Court also found that four states, including Virginia, had blanket primaries. The inclusion of Virginia as a blanket state appears to have been in error. *See* Va. Code § 24.1-182 ("No person shall vote for the candidates of more than one party.").

and the Libertarian Party of California Bylaws have similar provisions. *See* Pls.' Ex. 3 at 6, and Ex. 4 at 13.[11]

The California Democratic Party, the Peace and Freedom Party, and the Libertarian Party of California and certain of their officers brought this action against the Secretary of State of the State of California seeking a declaration that Proposition 198 is unconstitutional and requesting an injunction against its implementation.[12] The California Republic Party and certain of its officers intervened as plaintiffs. Californians For An Open Primary intervened as a defendant.[13] The court heard testimony over four days and has received numerous exhibits, including the reports of various experts.

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11. The Democratic National Committee's charter requires that state party delegates to the national convention be chosen through "processes which . . . restrict participation to Democrats only." Pls.' Ex. 2 at 2 (Art. 2, § 4(e)). *See also* Pls.' Ex. 9 at 4 (Rules 2.A. and 2.B. of the Delegate Selection Rules). The Rules of the Republican Party have a similar rule against blanket and open primaries. *See* Defs.' Ex. T at 25 (Rule No. 34(f)).

12. It appears that the political parties did not mount a campaign against Proposition 198 with the voters at the time of the election. *See* R.T. at 230; *Nader v. Schaffer*, 417 F. Supp. 837, 850 (D. Conn. 1976), *aff'd without opinion*, 429 U.S. 989 (1976) (criticizing plaintiffs for "seeking a change in the law by judicial fiat" rather than by political activity).

13. For ease of reference, throughout this opinion the terms "plaintiffs" and "defendants" shall include the intervenors, and when the political "parties" are referred to as taking a position in this action, the term shall include the individual officers who are also plaintiffs.

II.

This case presents two competing views as to the function of the direct primary and, to some extent, as to the function of the political parties. From the parties' perspective, the parties are autonomous organizations and the primary is their opportunity to select their leaders and to define their positions on political questions. From the defendants' perspective, the primaries are the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders, and the political parties, as they operate to frame the choice of candidates, are a part of a highly regulated governmental activity — the election process. Both positions find support in the Constitution and the relevant case law. The "freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). "As a result, political parties' government, structure, and activities enjoy constitutional protection." *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1369 (1997). However, the States also have a strong interest in the conduct of elections. "[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian*, 479 U.S. at 217. It is the clash of these two constitutionally rooted interests that must be resolved in this case.

The Supreme Court has never directly considered the constitutionality of a blanket or open primary. In *Democratic*

Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981), the Court had the opportunity to decide the constitutionality of Wisconsin's open primary but decided the case on a different basis, merely noting that the State Supreme Court had concluded that the "open primary serves [a] compelling state interest" and that "[u]pon this issue, the Wisconsin Supreme Court may well be correct." *Id.* at 121.[14] Perhaps the closest case is *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), but in *Tashjian* the Court addressed the reverse of the situation presented here; in *Tashjian* the state election law provided for a closed primary and the political party desired to open its primary to independent voters.[15] Thus, the Court had no occasion to

14. The Court viewed the issue as "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party." 450 U.S. at 121. Justice Powell in dissent would have held that the open primary was supported by compelling interests that outweighed the burden on the National Party. *Id.* at 126. Justice Powell's dissent, like Justice Abrahamson's opinion for the Wisconsin Supreme Court, discusses many of the issues relevant to this case.

15. The Court expressly cautioned that its holding was limited to the particular set of circumstances before it. *Id.* at 554 n.13 ("Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership."). *Nader v. Schaffer*, 417 F. Supp. 837, *aff'd without opinion*, 429 U.S. 989 (1976), also addressed the constitutionality of a closed primary. The court held that the State's closed primary was constitutional in the face of a challenge from two voters who wanted to vote in the primary elections without registering with a party. The court concluded that the closed primary was reasonably related to the legitimate goal of protecting the associational rights of party members.

address either the State's interests in an open or blanket primary or the burdens imposed on a political party by such a primary system. Two State Supreme Courts — the Supreme Courts of Alaska and Washington — have examined the constitutionality of the blanket primary and both have concluded that a blanket primary withstands a party's First Amendment challenge. *See O'Callaghan v. Alaska*, 914 P.2d 1250 (Alaska 1996), *cert. denied*, 117 S. Ct. 1690 (1997); *Heavey v. Chapman*, 93 P.2d 1256 (Wash. 1980); *Anderson v. Millikin*, 59 P.2d 295 (Wash. 1936). As noted above, the Supreme Court of Wisconsin came to the same conclusion concerning the Wisconsin open primary in the face of the Democratic Party's claim that by permitting non-party members to vote in its primary, including Republicans and adherents of other parties, the State's open primary violated the Party's associational rights. *See Wisconsin ex rel. La Follette v. Democratic Party*, 287 N.W.2d 519 (Wis. 1980).

The Supreme Court recently has explained the standard and manner of review that should be applied when a state election law is challenged by a political party on the basis of the First Amendment:

> When deciding whether a state election law violated First and Fourteenth Amendment associational rights, we weigh the " 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly

> tailored and advance a compelling state interest. Lesser burdens, however, trigger less-exacting review, and a State's " 'important regulatory interests' " will usually be enough to justify " 'reasonable nondiscriminatory restrictions.' " No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1370 (1997) (citations omitted). In describing the "flexible" balancing test now used by the Court, the Ninth Circuit has cautioned that even when "strict scrutiny," the highest standard of review, has been invoked, "its invocation in election law cases has not preordained their outcome." *Lightfoot v. Eu*, 964 F.2d 865, 869 (9th Cir.1992). Moreover, the Court does not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons*, 117 S. Ct. at 1372.

In evaluating the constitutionality of Proposition 198, the court therefore must first determine the character and magnitude of the burdens imposed by the blanket primary on the associational rights of the political parties. The court then must consider the State's interests and weigh the strength of those interests against the particular burdens placed on the parties' associational rights. The greater the intrusion on the parties' associational rights, the greater must be the State's interests and the more narrowly tailored must be the Proposition to advance those interests.[16]

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16. Defendants stress an argument that must be addressed at the outset. Defendants argue that because a majority of the members (Cont'd)

III.

The parties' main argument is that a blanket primary permits voters who are not members of a particular party — who may indeed be hostile to that party's electoral interests — to vote in that party's primary and thus to participate in

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(Cont'd)
of the Democratic and Republican parties, and presumably of the minor parties, voted for Proposition 198, the membership of the parties have consented to Proposition 198 and therefore there is no issue for the court to resolve. There are three problems with this argument. First, even though the polls appear to be accurate, those polls do not report the votes of minor party members. It is only by inference that it can be concluded that minor party members also supported Proposition 198. Moreover, and second, even if the polls are accurate, this is not the way in which decisions customarily are made in our democracy. In no other context do we accept the results of polling for the act of voting. Finally, the parties have selected certain procedures for the modification of their rules. These procedures require deliberation and decisionmaking by the parties' respective central committees. Other deliberative bodies have similar procedural rules. Such rules may affect the nature of the debate — indeed, may cause there to be debate — and may affect the outcome of the decision. We would not accept a poll of legislators as the equivalent of a legislative vote. For much the same reason, a poll of voters is not the equivalent of a decision by a party according to the procedural rules of the party. The court therefore rejects the argument that the "parties," defined as the electorate, have agreed to Proposition 198 and that this lawsuit is merely an attempt by dissidents to carry on intra-party disputes that they previously lost at the ballot box. For an interesting discussion of "who gets to speak for 'the party'," see Daniel H. Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry* 71 Tex. L. Rev. 1741, 1777 (1993).

the process by which the party defines its positions on a variety of issues and by which it chooses its standard bearers. In *Tashjian* the Supreme Court recognized the importance of these interests in invalidating a Connecticut statute that forbade the parties from permitting non-members from voting in their primaries:

> [T]he freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' . . . The statute here places limits upon the group of registered voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Tashjian, 479 U.S. at 215-16 (citations omitted). *Accord Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1370 (1997) ("the New Party, and not someone else, has the right to select the New Party's 'standard bearer' ").

A.

The parties contend that their interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how Proposition 198 will work in practice, the blanket primary must be unconstitutional on its face. Yet while the interest

in determining who will vote in a party's primary is one protected by the First Amendment, and is undoubtedly an important interest, this is not the end of the inquiry. If it were, then open primaries would also be unconstitutional upon any party's objection: an open primary, every bit as much as a blanket primary, permits voters who are not registered in a party to vote in that party's primary. But many of the States have some version of an open primary and to invalidate them all on this theoretical ground would be an extraordinary intrusion into the complex and changing election laws of the States and would remove from the American political system a method for candidate selection that many States consider beneficial and which in the uncertain future could take on new appeal and importance.[17]

Similarly, were the parties' power to determine membership and to select their nominees unfettered, then the States would also lack power to prescribe candidate selection through a primary election or to require that all voters who have met a State's registration requirements be

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17. The expert witnesses in this case differ as to how many of the States have open primaries or some feature of an open primary. Part of this dispute depends on how to classify those States that treat a voter's request for a ballot as tantamount to a declaration of party affiliation. Even if this patent fiction were accepted, close to half of the States permit voters who are not members of a particular party, and who may be independent or, in some States, members of other parties, to vote in that party's primary election. Moreover, as Justice Powell noted, when a voter may register immediately before voting at the primary, "the difference between open and closed primaries loses its practical significance." *Democratic Party*, 450 U.S. at 132 (Powell, J., dissenting).

permitted to vote in the parties' primaries notwithstanding any other membership requirement that a party might impose.[18] However, the States have considerable regulatory authority over the process of candidate selection and may require that the parties select their candidates by a primary election open to registered voters. *See Lightfoot v. Eu*, 964 F.2d 865, 871 (9th Cir. 1992) ("political parties' rights to nominate whomever they want, however they want, is not sacred"); *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997) (State can prohibit fusion candidacies). The States' authority over the political parties stems in part from the Constitution, Art. I, § 4, cl. 1, and in part from the public function that the political parties perform in the candidate nominating and political processes.

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18. The most dramatic example of government control of a political party's membership requirements are the White Primary Cases in which the Supreme Court held that the Democratic Party of Texas could not exclude black voters from its primary. *See Smith v. Allwright*, 321 U.S. 649 (1944). An interesting example of how a party's desire to limit its membership could conflict with state law is suggested by the testimony of plaintiff Gail Lightfoot, a member of the State Executive Committee of the Libertarian Party: "You become a member of the Libertarian Party by joining, by asking. It's a request to become a member. And you pay dues and sign a pledge [of nonviolence]. In California, because of state law, state law says that all registered voters that take the name Libertarian are members of the party. But we consider pledge-signing individuals who have paid their dues and signed the pledge to be the true members of our party." R.T. at 153-54; *see also* R.T. at 179 (Peace and Freedom Party confers party membership on persons who are "deprived of the right vote by the State of California because of age, citizenship, or prior social behavior").

Moreover, the analogy on which the parties rely so heavily, the analogy between the political parties and the myriad of private political, charitable, recreational, educational or religious associations at the center of American life, is imperfect at best. The political scientists who testified in this case agree that a political party cannot be described simply as a private club or association; instead, a political party has three distinct aspects — the party in the electorate, the party organization, and the party in government.[19] Unlike other private associations, at least in one of their avatars — the party in government — the political parties are very like the government itself. *See* Lowenstein, *supra*, at 1757 ("unlike any other private groups, political parties routinely, pervasively, and legitimately exercise their influence from within the government"). And the parties perform functions that are fairly characterized as governmental in nature, such as the nomination of candidates.

Furthermore, at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations. The major political parties in this

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19. *See* Pls.' Ex. 6, *Cain Report*, at 15 ("Since the seminal work of the scholar V.O. Key, parties are thought to consist of three components: the party in government, the party in the constituency and the party as organization."); Lowenstein, *supra*, 71 Tex. L. Rev. at 1760 (1993) ("Although there have been a great many typologies of the varying 'locations' and functions of parties, probably the most common identifies three: the party in the electorate, the party organization, and the party in or running for public office . . . The very fact that references to 'the Democrats' and 'the Republicans' are more common in ordinary conversation than references to 'the Democratic party' and 'the Republican party' testifies to the loose and manifold nature of our concept of 'party.' ").

country " 'have been characterized by a fluidity and overlap of philosophy and membership.' It can hardly be denied that [the parties] generally [have] been composed of various elements reflecting most of the American political spectrum." *Democratic Party*, 450 U.S. at 133 (Powell, J., dissenting) (citations omitted). And, as discussed above, the term "party member" as applied to registered voters is something of a misnomer. The States determine who will vote at primary elections — registered voters. *See* Cal. Elections Code §§ 2151, 7164, 7362, 7804, 8001. These voters have not allied themselves to a political party in the customary way that one normally becomes a member of a private association; they have not paid dues, taken an oath, expressed agreement with certain ideals or goals, attended meetings, accepted any obligations, or attended upon any other rite of initiation. The parties do not and could not insist upon more than mere registration as the price of voting in the primary elections.[20]

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20. "[T]he essence of the legal definitions of party membership in the United States will surely continue to be self-designation. The fact remains that today even in Illinois, New York, or any other closed-primary state you are a Democrat if you say you are; no one can effectively say you are not; and you can become a Republican any time the spirit moves you simply by saying that you have become one. You accept no obligations by such a declaration; you receive only a privilege, the privilege of taking an equal part in the making of the party's most important decision, the nomination of its candidates for public office. The only remaining restriction is that in some states, such as California, you may have to let the registrar of voters know that you have changed parties, and you may have to do so several weeks or even months before your new party's next primary. But in many closed-primary states you do not even have to do that, and in Wisconsin and the other open-primary states you are

(Cont'd)

Thus, to contend that Proposition 198 permits non-party members to vote in a party's primary, while accurate, covers over much of the imprecision in the political reality.

In short, it is necessary to look beyond the parties' claim that their constitutional interest in limiting candidate selection to their respective members necessarily prevails over any State interest and without regard to how the voters may behave under a blanket primary.

B.

Turning to the more practical implications of a blanket primary, the parties contend that a blanket primary process in California will have a destructive effect on all political parties both major and minor. The parties predict that there will be widespread cross-over voting, whether benevolent or malicious, and that the consequences of this large cross-over vote will be many and adverse to the parties. The parties contend that the cross-over vote, and the prospect of a large cross-over vote, will affect the selection and behavior of party nominees and elected officials; weaken party discipline; increase the costs of primary elections by causing candidates to compete as if it were a general election; dampen the morale of party activists; and disrupt internal party structure and governance.

(Cont'd)
not allowed to make an official declaration of your party membership. One can only conclude that the so-called 'closed' primaries are just a hair more closed than the so-called 'open' primaries." A. Ranney, *Curing the Mischiefs of Faction* 166-67 (1975), *quoted in Wisconsin ex rel. LaFollette v. Democratic Party*, 287 N.W.2d at 510.

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Much of the testimony at trial was directed to the question of whether voters in blanket primary states tend to cross over in sufficient numbers to influence the outcome of elections and whether they cross over for benevolent or malevolent reasons. A cross-over voter is one who votes for a candidate of a party in which the voter is not registered. Thus, the cross-over voter could be an independent voter or one who is registered to a competing political party.[21] A cross-over voter may be actuated by three different purposes. First, the voter's purpose may be to vote for the voter's most preferred choice to win in the general election; this kind of cross-over voter is sometimes referred to as engaging in "sincere" voting. Second, the voter may be engaged in "strategic" voting, designed to obtain the best possible outcome, by voting for the voter's second choice in a setting where the voter's first choice, within the voter's own party, either has no apparent chance of victory at the general election or is so certain to win the party's nomination that the voter perceives that his or her vote is best spent influencing another party's primary and thus the choice at the general election. Finally, the voter may be a raider, crossing over to vote for a candidate who is perceived as the "weakest" of an opposing party's candidates in the hopes that this candidate will win the primary only to be trounced at the general election.[22]

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21. Some of the experts exclude independents from their definition of cross-over voters.

22. A sophisticated raider will vote for the weakest among those candidates who have a realistic chance of prevailing at the primary.

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The parties contend that a blanket primary will unleash a torrent of cross-over voting even by comparison to open primaries. The parties reason that unlike an open primary, a blanket primary permits a voter to cross over as to particular contested elections without losing the ability to vote in the remainder of the contests in the voter's own party. The evidence at trial suggests that the parties are correct that cross-over voting will be more prevalent after Proposition 198. Indeed, defendants can hardly dispute this point while maintaining that the State's interests are furthered by a blanket primary precisely because it facilitates cross-over voting. Nonetheless, the parties' characterization of the likely amount or effects of cross-over voting due to a blanket primary is overdrawn.

To begin with, there is little evidence that raiding will be a factor under the blanket primary. On this point there is almost unanimity among the political scientists who were called as experts by the plaintiffs and defendants. Professor Costantini, for plaintiffs, gave his opinion that

> [s]urvey evidence tends not to support any fear that raiding (sometimes characterized as "mischievous voting") will be a common phenomenon under Proposition 198. At least in open presidential primaries (the focus of almost all the relevant studies), it appears that the great majority of crossover voters — from 90% to 95% or more — invade a party's primary to vote for a preferred candidate and not to vote for a candidate who they will oppose in the general election and who they believe will be easier to defeat in that election.

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Pls.' Ex. 7, *Costantini Report*, at 7; R.T. at 485-86. Professor Donald Olson of the University of Washington-Seattle, reflecting on the over half century of experience with a blanket primary in Washington, explained that the conditions for successful raiding rarely exist:

> The potential for raiding under the blanket primary generates wide media attention and spawns electioneering lore that is simply unwarranted by actual experience. Technically defined, raiding would occur where partisan voters of party X cross-over in sufficient numbers to help select the weakest or most vulnerable candidate in party Y. The requirements for this form of electoral subterfuge are: 1) the absence of a meaningful primary contest in party X; 2) provision of sufficient information to identify the weaker and most vulnerable potential opponent in party Y; 3) concerted action by a large enough bloc of voters in party X to influence the outcome in the primary of party Y; and 4) the abandonment of traditional party loyalties by partisan voters to enter the opponent's primary.
>
> In the experience of Washington state, these requirements are simply too demanding and have not been fulfilled in actual practice.

Defs.' Ex. G, *Olson Report*, at 6. *See* Pls.' Ex. 6, *Cain Report*, at 6-7; R.T. at 355. Given that the purpose of raiding is to weaken a competitive party's advantage at the general election, raiding is not a concern for minor parties because their candidates rarely have a chance of prevailing at the general election. Indeed, no conclusive instance of raiding

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in such numbers as to affect the outcome of any primary was offered by plaintiffs.[23]

As to benevolent cross-over voting, the evidence suggests that there will be particular elections in which there will be a substantial amount of cross-over voting — perhaps as high as 25% of the vote for that office — although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states. There will be a small number of elections in which the cross-over vote proves decisive, and there will be other elections in which the possible importance of the cross-over vote will be an influence on the conduct of the primary campaign and the conduct of elected officials.

The experience in Washington suggests that as to the election for any particular office, approximately 10% of the voters are cross-over voters, excluding independents, while in some exceptional cases this figure may rise as high as 20-25%. R.T. at 511.[24] Typically the cross-over vote in Washington does not change the result of an election but

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23. Professor Cain suggests that the 1974 Alaska Gubernatorial Republican primary may be an example of raiding in which Democrats and Independents "raided" to support liberal Republican Jay Hammond over former Governor Walter Hickel. However, as Professor Cain notes, the cross-over voters may have been "liberal shoppers" as opposed to saboteurs. *See* Pls.' Ex. 6, *Cain Report*, at 7.

24. According to Professor Olson, approximately 25-33% of voters vote for candidates of only one party throughout the ballot, voting a straight ticket. The remainder of the voters cross over at least once.

only the margin of victory. R.T. at 513. Moreover, the amount of cross-over voting is greater in a blanket primary than an open primary but not dramatically so. According to Professor Nagler, who co-authored the most comprehensive study of patterns of cross-over voting presented at the trial, the average cross-over rate, excluding independents, is something on the order of 5% of voters in closed primary states,[25] 10% of voters in open primary states, and 11-15% in blanket primary states. R.T. at 780, 788; Defs.' Ex. H, *Alvarez and Nagler Report*, at 11-12. The study concludes that "crossover voting in blanket primaries is not dramatically higher than in other types of open primary systems" and that "there is very little crossover voting in general in primary elections in the United States." *Id.* at 35-36.[26]

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25. In a closed primary state, a cross-over voter is one who identifies with one party but decides to register in another party for the purpose of voting in the primary of that other party.

26. Plaintiffs fail to present substantial or convincing evidence that the minor political parties will be affected by cross-over voting to any significant degree. A strategic voter would not cross-over to vote in a minor party's primary because the victor of the minor party primary will not likely be the winner in the general election. Moreover, the minor parties rarely have contested primaries. R.T. at 167, 618, 630-31. Finally, the minor parties make much of their small turn-out at the primary election compared to the much larger numbers of voters who select their candidates at the general election. From this disparity, the minor parties argue that they will be swamped at the primary election by the same non-party members who vote for their candidates at the general election. This conclusion does not follow. Those non-party members who vote for minor party candidates at the general election are most likely voters whose preferred candidates were not selected in the primary of a major party. R.T. at 193.

Although cross-over voting typically does not change the outcome of a primary and may not be much greater in a blanket than in an open primary, it is probable over time that there will be some elections under Proposition 198 that will be decided by the cross-over vote. Cross-over voting is most likely to occur when one party's primary is competitive while the other party's primary is not. When this condition of "asymmetric competition" occurs, voters of the party with the noncompetitive primary may cross over to the other primary to influence the choice. The incentive to cross over will be particularly high if the winner of the other party's primary is almost certain to win at the general election. *See* Pls.' Ex. 6, *Cain Report*, at 8. Every two years in California there are 80 Assembly races, 20 State Senate races, and 52 Congressional races. Examining the 1996 Assembly primaries, Professor Cain identified ten races in which there were asymmetric competitive conditions. In some of these races, a cross-over rate of 5% could have changed the outcome of the election had all of the cross-over voters voted for the same candidate. Given that in Washington, cross-over rates occasionally reach levels as high as 20-25%, and that the cross-over rate in California could be higher than Washington,[27] it is likely that in the fullness of time some California primary races will be decided by cross-over voters, even if the number of such occasions is not large. Depending on the circumstances, the swing of even one seat could give a legislative majority to one party.

Furthermore, the possibility of a decisive cross-over vote — whether or not that vote materializes — could well affect

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27. *See* R.T. at 574. Whether cross-over rates in California will be similar to those in the other blanket primary states is necessarily a matter of conjecture.

the conduct of elections and elected officials. Under a blanket or open primary, the primary election becomes similar to the general election. Candidates will perceive a need or opportunity to attract support from the entire electorate, not simply from members of their respective parties. This will affect not only the cost of the primary — which is likely to increase, *see* R.T. at 270 — but may affect the positions that candidates take on political issues as they seek to attract cross-over voters. Moreover, once elected, candidates may perceive that the cross-over vote makes them less vulnerable at the primary to the wrath of the party organization or party regulars for acts of apostasy. A blanket or open primary weakens the "disciplining effect" of the primary challenge in requiring "the officeholder [to] carry out the party philosophy and support the majority position of the party caucus." R.T. at 214. The corollary to this loss of discipline is a loss of power to party activists such that the ardor of party volunteers and activists may be dampened in a system that permits non-party members to exert influence over the party's selection of a candidate. This has been the experience in Washington and is likely to occur in California. *See* R.T. at 558; R.T. at 18; R.T. at 989-990.

Finally, the parties argue that their internal governance will be disrupted by the blanket primary and the cross-over vote. Although Proposition 198 specifically exempts party committee positions from the blanket primary, both the Republican and Democratic Parties permit officeholders and nominees to appoint members of their governing bodies, the Democratic State Central Committee and the Republican State Central Committee. Because nominees may have been selected by non-party members, and because the nominees

in turn choose members of the Central Committees, the parties contend that their governing body may be adulterated. Further, the parties warn that their respective national organizations may not accept the results of the California presidential primary, if that primary is a blanket primary, with the result that the parties may be forced to hold a nominating convention or caucus. Neither of these contentions is particularly forceful, however. As to membership on the Central Committee, the parties are free to change their selection process if they wish. Moreover, both parties already give more positions on the Central Committee to successful candidates; yet these successful candidates are precisely those who have appealed more broadly across party lines. R.T. at 9, 224. As to the national nominating conventions, the California parties may be forced to adopt a different procedure for delegate selection other than the presidential primary or they may receive a waiver from their national organizations such as Wisconsin eventually received from the Democratic Party. R.T. at 123, 145. This is a choice for the parties to make, and they can do so as they please without interference from the State.

C.

The magnitude of the burdens imposed on the parties by Proposition 198 are not fairly characterized either as "severe" or as "negligible," the two labels most often applied in the caselaw at this juncture of the analysis. The burdens are not negligible. State law requires each party to select its candidate through a primary, and the winner of the primary will be the party's nominee. The blanket primary wrests a measure of control of the primary process from the party

and its members. This is its purpose. The party may still endorse a candidate and may throw financial support to a particular candidate. And, in the typical election, the cross-over vote will not be decisive. Yet by permitting non-party members to vote in a party's primary — even granting the uncertainty of the label "party member" — Proposition 198 is an intrusion on a party's traditional right to select its own candidate. In this respect, the blanket primary is no different from an open primary although the practical effect of a blanket primary on the selection process may be somewhat greater than an open primary. In addition, a blanket primary, like an open primary, may depress the vigor and morale of party activists and may affect the ability of the party to discipline errant legislators.

On the other hand, the burdens on the parties due to Proposition 198 are not likely to prove severe or debilitating. The Washington experience, as well as that of the many open primary states, suggests that Proposition 198 will not diminish the efficacy or strength of the political parties in California by any substantial degree.[28] Indeed, a study of the political parties in the 1970's and 1980's in 13 western states, including Washington and California, concluded that the political parties in Washington were the most competitive with one another of all 13 states. R.T. at 524; *see Tashjian*, 479 U.S. at 223 n.12 ("dire" predictions as to decay of parties not borne out by the 29 States that have open primary features). Both the Democratic and Republican Parties

28. Professor Cain would not expect a blanket primary to be so debilitating to the parties that it should be removed as an option altogether even if the parties were in favor of it. R.T. at 457. Professor Cain's greatest concern is to protect party autonomy.

continue to be strong political parties in Washington, and can be expected to operate with little diminution in their effectiveness in California.[29] The parties do not show that the blanket primary is significantly different theoretically or practically from the open primary. Nor do they show or even contend that Proposition 198 has any discriminatory purpose or effect. Thus, the burden imposed by a blanket primary falls evenly on all of the parties whatever their size or ideology. Finally, Proposition 198 leaves untouched the wide field of party endeavor that is not directed specifically to the primary, activities such as developing the party platform, registering new voters, and getting out the vote on election day. Defs.' Ex. I, *Quinn Report* at 18.

In light of all of these considerations, the court finds that the parties have succeeded in showing that the blanket primary imposes a significant but not severe burden on their associational rights. To survive the challenge mounted by plaintiffs, Proposition 198 must be supported by interests that are sufficient to outweigh the burdens identified above. Those interests need not be compelling, given that the burdens are not crushing, but they must be important.

29. According to Professor Olson the Washington Republican Party has been ranked as among the strongest Republican parties in the nation. Professor Olson states that the Washington Republican Party "is alive, it is healthy, it is well, it is vigorous. It is the single most important institution for recruiting candidates to run for office. It's the single most important institution for endorsing candidates. It is the most important fundraising institution in the conduct of elections." R.T. at 527. According to Professor Olson although the Washington Democratic Party is not so dynamic as its competitor, it is still of above average organizational strength as compared to the Democratic parties of the 50 states. R.T. at 528.

IV.

The States have broad regulatory authority over the conduct of elections including primaries.[30] The primary election is the critical first stage in the electoral process: "The direct primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers." *Storer v. Brown*, 415 U.S. 724, 735 (1974). "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the political parties] have been made." *Morse v. Republican Party*, 116 S. Ct. 1186, 1199 (1996) (citation omitted).

Proposition 198 is the latest development in a history of political reform measures that began in the Progressive Era. "The Progressives believed democracy should be something greater than competition between political parties." *Lightfoot v. Eu*, 964 F.2d at 872. The Progressives sought to diminish the importance of the parties and "party bosses" by establishing nonpartisan local elections, a comprehensive civil service system, direct legislation through the initiative

30. "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 729-30 (1974).

and referendum, and the cross-filing system by which members of one party could run in the primary of the other party. *See* Defs.' Ex. I, *Quinn Report*, at 7 (quoting J. Owens and E. Costantini, *California Politics and Parties* (1970)).[31] The cross-filing system is of particular note because in practice it bore some resemblance to a blanket or nonpartisan primary system.[32]

31. Lowenstein contrasts the Progressives' "vision of a democracy purged of corruption by placing widely dispersed power in the hands of common men and women" with the views of "party renewal advocates" who believe in autonomous, strong, cohesive political parties who engage in "responsible party government" much on the European parliamentary model. *See* Lowenstein, *supra*, 71 Tex. L. Rev. at 1761-71, 1791. The debate in this case has been framed by the experts in similar terms.

32. Under the cross-filing system, "[a] candidate registered in one party may seek the nomination of all parties at the primary. If he fails to secure the nomination of his own party, he cannot be the candidate of any party at the general election." *Jones v. McCollister*, 159 Cal. App. 2d 708 (1958). Under the cross-filing system voters registered to different parties had the opportunity to vote for the same candidates. According to Dr. Quinn, as the system worked in California, the winner of one party's primary tended to be the winner of the other party's primary as well:

> The cross filing system existed in California from 1911 to 1959. Under this system, a legislator or member of congress could file to run in both the Democratic and Republican primaries, and so long as he or she won their own party nomination, they would win the nomination of the other party as well. . . . On the general election ballot, the winners, usually incumbents, are shown as the nominees of both parties.

Defs.' Ex. I, *Quinn Report*, at 7.

Defendants advance a number of State interests furthered by Proposition 198. All of the various interests, however, reduce to one fundamental contention: according to defendants, Proposition 198, like other Progressive Era reforms, enhances the democratic nature of the election process and the representativeness of elected officials.

Defendants stress that a blanket primary opens up the candidate selection process to two types of arguably "disenfranchised" voters — independents and minority party voters in safe districts. In a blanket primary, independent voters will be able to participate in framing the choice that they will ultimately have to make in the general election. Approximately 11% of the electorate in California are registered as independents, and the proportion of independent voters is growing rapidly. R.T. at 940. Moreover, many California voters reside in "safe districts," districts in which one party is dominant.[33] Voters in these districts who belong to the minority party have no influence or voice because the general election is decided as a practical matter in the primary of the dominant party. Of 15.6 million registered voters in California, approximately one quarter are "disenfranchised" in this way. R.T. at 854. Defendants suggest that the inability of these voters to influence the outcome of the election in their districts leads to the election of representatives who

33. According to Dr. Quinn, "A district could be considered safe if it had not been contested between the parties since it was created in the 1991 reapportionment; the area covered had been historically one party in its voting . . . ; there was no significant money spent in the election between the two parties in '94 and '96 . . . ; and if the incumbent received more than 55 percent of all of the votes cast in the election." R.T. at 847-48.

see no need to represent these voters or to pay heed to their interests. Of course, such voters could register in the majority party, but this would require them to give up their current party or independent registration.

Apart from the exclusion of independents and minority voters in safe districts, defendants contend that the closed primary gives undue power to party members and loyalists, including incumbent elected officials, such that the voters in the general election are presented with candidates who are more partisan and who take positions on the policy issues of the day that are not representative of the majority of the electorate. *See* R.T. at 243, 269, 299, 857. Defendants note that turnout is low at primary elections, and thus that a minority of more partisan party members, influenced by the endorsements of party leaders, determine the choice for the much larger group of all voters at the coming general election. Defendants suggest that this skewing of the process toward partisan candidates leads to legislative impasse and thus alienation of the electorate from the political system. Defendants contend that candidates who would command majorities at the general election are unable to prevail at the primary such that the voters at the general election are forced to pick among candidates none of whom is the first choice of the majority of voters. R.T. at 255-256. Although these assertions are not readily susceptible of proof, many are not contested,[34] or are supported by persuasive opinion evidence

34. There is some evidence that elected officials from blanket primary states are closer to the views of the electorate as a whole than officials from closed primary states. *See* Defs.' Ex. E, *Gerber Report*, at 11. Some of plaintiffs' experts apparently would agree

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from defendants' experts. *See, e.g.*, R.T. at 954-963, 974-975. Furthermore, these contentions are clearly stated in the ballot pamphlet, and it is a fair inference from the margin of support that the people of California agree that a blanket primary system will lead to the election of more representative "problem-solvers" who are less beholden to party officials and "special interest groups." While political scientists may disagree on the question of whether the political system is benefitted when parties are more or less distinct or polarized, it is apparent that the voters have sided with less partisanship in adopting Proposition 198.[35]

Defendants also argue that representativeness and democratic participation are benefitted by the higher voter participation expected in a blanket primary election. Voter participation in primary and general elections in California has declined markedly over the past two decades. R.T. at

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that candidates selected in a blanket primary are likely to take less partisan or extreme positions than those selected in a closed primary. They do not concede that this is healthy, however, because they believe that the system is benefitted by greater partisanship and greater distance between the parties.

35. There is some suggestion in defendants' brief that the blanket primary will also make the parties more representative and therefore will benefit and strengthen the political parties. Defs.' Post-Trial Brief at 45. The Supreme Court has given little weight, however, to State interests couched in terms of what is good for the parties. The Court has found that it is for the parties to decide what is in their interest. *See Tashjian*, 479 U.S. at 222-24; *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 227-28 (1989).

658. Turnout rates in blanket primary states have been higher than in California, and there is reason to expect that by providing more choice, the blanket primary may encourage more voters to participate at the primary election. Similarly, defendants contend that elections will be more competitive under the blanket primary, again leading to an increase in voter interest and participation. Although the empirical case for the assertion that blanket primaries are more competitive than other primaries is not conclusive, there is reason to expect some increase in the number of candidates, the closeness of elections, and, therefore, voter turnout.

Finally, defendants point to one interest — voter privacy — that does not fit neatly under the representativeness or participation headings, although it is possible that greater privacy could lead to greater participation. Defendants note that a blanket primary protects voter privacy by permitting voters to participate in the primary election without publicly declaring a party affiliation as is the case in closed primary states and in some open primary states.

V.

Taken as a whole the State's interests that support the blanket primary are substantial, indeed compelling. There is a "substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community." *Storer v. Brown*, 415 U.S. 724, 729 (1974). In attempting to reduce partisan strife, Proposition 198 is similar to other measures adopted by the States to deal with the problem of factionalism, a problem that deeply troubled the framers of

the Constitution. *See The Federalist No. 10* (Madison). A State's interest in ameliorating "unrestrained factionalism" is a compelling one. Increasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in the primary process are all interests of the first order. *See Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir. 1992) (State's interest in a direct primary is compelling). The voters' belief in the fairness of the electoral process is also a substantial state interest; it is apparent that the voters of California believe that the system is fairer when all voters, including independents and regardless of party affiliation, may participate in framing the choice of candidates at the general election. And while the parties argue that there are other ways to increase voter turnout, the fundamental goal of enhancing representativeness by providing all voters with a choice that is not predetermined by party members alone can only be advanced by the blanket primary. Unlike *Tashjian* in which the Democratic Party controlled the legislature and attempted to tell the Republican party who could vote in its primary, and where the State's purported interest in a closed primary was to protect the parties from disruption from without, Proposition 198 is a non-discriminatory measure that was adopted by a clear majority of voters, with a convincing margin from both major parties, and which advances interests that are uniquely those of the State and its electorate as opposed to the parties. These interests outweigh the also substantial interest that the political parties have in controlling who votes in the primary.

In reaching this conclusion, the court does not decide whether a blanket primary is a good idea; it may prove to be a bad idea, in which case the people of the State presumably

will act to reform the system in the future as they have in the past. Nor does the court decide whether the voters were correct in concluding that a more representative and participatory system is desirable at this time in the State's history or whether it is wise to weaken the parties by some degree to further the goals of representativeness and participation. These important questions are for the people of the State to decide.

Each of the States has its own experiment in democratic government. The history of election law is one of change and adaptation as the States have responded to the play of different political forces and circumstances. There is little reason to expect that the future will be any different. The court concludes that a blanket primary serves sufficiently weighty interests that the State of California should not be precluded from ever trying such a procedure.

Judgment is awarded to defendants.

IT IS SO ORDERED.

Dated: 24 November 1997

s/ David F. Levi
DAVID F. LEVI
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 4, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-17440
D.C. No. CV-96-02038-DFL

CALIFORNIA DEMOCRATIC PARTY; ART TORRES; KATHY BOWLER; PAUL JORJORION; PEACE AND FREEDOM PARTY; C.T. WEBER; LIBERTARIAN PARTY OF CALIFORNIA; GAIL LIGHTFOOT,

Plaintiffs-Appellants,

and

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER; SHAWN STEEL; DONNA SHALANSKY,

Plaintiffs-Intervenors,

v.

BILL JONES, Secretary of the State of California,

Defendant-Appellee,

v.

CALIFORNIANS FOR AN OPEN PRIMARY,

Defendant-Intervenor-Appellee.

Appendix C

No. 97-17442
D.C. No. CV-96-02038-DFL

CALIFORNIA DEMOCRATIC PARTY; ART TORRES; KATHY BOWLER; PAUL JORJORIAN; PEACE AND FREEDOM PARTY; C.T. WEBER; LIBERTARIAN PARTY OF CALIFORNIA, GAIL LIGHTFOOT,

Plaintiffs,

and

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER; SHAWN STEEL; DONA SHALANSKY,

Plaintiffs-Intervenors-Appellants,

v.

BILL JONES, Secretary of the State of California,

Defendant-Appellee.

ORDER

Before: HUG, Chief Judge, and B. FLETCHER and TROTT, Circuit Judges

All motions requesting that the court take judicial notice are denied. *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 548 n.13 (9th Cir.1998)

Appendix C

The panel has voted unanimously to deny the petition for rehearing. Chief Judge Hug and Judge Trott vote to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for an en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

APPENDIX D — TEXT OF PROPOSED AMENDMENT TO THE ELECTIONS CODE

Proposition 198: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure amends and adds sections to the Elections Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. This act shall be known and may be cited as the "Open Primary Act."

SEC. 2. Section 2001 is added to the Elections Code, to read:

2001. All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation.

SEC. 3. Section 2151 of the Elections Code is amended to read:

2151. At the time of registering and of transferring registration, each elector may declare the name of the

political party with which he or she intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.

The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, ~~but no person shall be entitled to vote the ballot of any political party~~ *and that all properly registered voters may vote for their choice* at any primary election ~~unless he or she has stated the name of the party with which he or she intends to affiliate~~ *for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance*. The voter registration card shall include a listing of all qualified political parties.

~~No~~

Notwithstanding any provision to the contrary, no person shall be permitted to vote the ballot ~~of any party or for any delegates to the convention of any party~~ *for any elective political party central or district committee member* other than the party designated in his or her registration, except as provided by Section 2152.

SEC. 4. Section 13102 of the Elections Code is amended to read:

13102. (a) All voting shall be by ballot. There shall be provided, at each polling place, at each election at which public officers are to be voted for, ~~but~~ one form of ballot for all candidates for public office, ~~except that, for partisan primary elections, one form of ballot shall be provided for~~

~~each qualified political party as well as one form of nonpartisan ballot~~ *listing all candidates for public office*, in accordance with subdivision (b).

(b) At ~~partisan~~ *such* primary elections, each voter ~~not registered as intending to affiliate with any one of the political parties participating in the election~~ shall be furnished ~~only a nonpartisan~~ *an official primary* ballot. The ~~nonpartisan~~ *official primary* ballot shall contain ~~only~~ the names of all candidates for nonpartisan *and partisan* offices and measures to be voted for at the primary election. ~~Each voter registered as intending to affiliate with a political party participating in the election shall be furnished only a ballot of the political party with which he or she is registered and the nonpartisan ballot, both of which shall be printed together as one ballot in the form prescribed by Section 13207.~~

SEC. 5. Section 13203 of the Elections Code is amended to read:

13203. Across the top of the ballot shall be printed in heavy-faced gothic capital type not smaller than 30-point, the words "OFFICIAL BALLOT." However, if the ballot is no wider than a single column, the words "OFFICIAL BALLOT" may be as small as 24-point. Beneath this heading, in the case of ~~a partisan~~ *an official* primary election, shall be printed in 18-point boldfaced gothic capital type ~~the official party designation or~~ the words ~~"NONPARTISAN~~ *"OFFICIAL PRIMARY* BALLOT" ~~as applicable~~. Beneath the heading line or lines, there shall be printed, in boldface type as large as the width of the ballot makes possible, the number of the congressional, Senate, and Assembly district,

the name of the county in which the ballot is to be voted, and the date of the election.

SEC. 6. Section 13206 of the Elections Code is amended to read:

13206. (a) On the ~~partisan~~ ballot used in a direct primary election, immediately below the instructions to voters, there shall be a box one-half inch high enclosed by a heavy-ruled line the same as the borderline. This box shall be as long as there are columns for the ~~partisan~~ ballot and shall be set directly above these columns. Within the box shall be printed in 24-point boldfaced gothic capital type the words "Partisan Offices."

(b) The same style of box described in subdivision (a) shall also appear over the columns of the nonpartisan part of the ballot and within the box in the same style and point size of type shall be printed "Nonpartisan Offices."

(c) This section shall not apply to ballots for elective political party central or district committee members prepared in accordance with Section 13300.

SEC. 7. Section 13230 of the Elections Code is amended to read:

13230. (a) If the county elections official determines that due to the number of candidates and measures that must be printed on the ballot, the ballot will be larger than may be conveniently handled, the county elections official may provide that a ~~nonpartisan~~ ballot *for nonpartisan offices and*

measures shall be given to each ~~partisan~~ voter, together with his or her ~~partisan~~ *official primary* ballot, ~~and that the material appearing under the heading "Nonpartisan Offices" on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots~~.

(b) ~~If the~~ *Notwithstanding Section 13300, the* county elections official ~~so provides,~~ *shall provide that* the procedure prescribed for the handling and canvassing of ballots shall be modified to the extent necessary to permit the use of two ballots by partisan voters. The county elections official may, in this case, order the second ballot to be printed on paper of a different tint, and assign to those ballots numbers higher than those assigned to the ballots ~~containing partisan offices~~ *for nonpartisan offices and measures.*

SEC. 8. Section 13300 of the Elections Code is amended to read:

13300. (a) By at least 29 days before the primary *election*, each county elections official shall prepare ~~separate~~ *identical* sample ballots for each ~~political party and a separate sample nonpartisan ballot, placing~~ *voter, provided however, that in the case of ballots involving elective political party central or district committee members, each county elections official shall prepare separate ballots for the sole use of persons registered with that party, as provided for in Section 2151. On the official identical primary ballots, each county elections official shall place* thereon in each case in the order provided in Chapter 2 (commencing with Section 13100), and under the appropriate title of each office, the names *and party affiliations* of all candidates *organized randomly as*

provided in Section 13112 and not grouped by political party, for whom nomination papers have been duly filed with him or her or have been certified to him or her by the Secretary of State to be voted for in his or her county at the primary election.

(b) The sample ~~ballot~~ *ballots* shall be identical to the official ballots, except as otherwise provided by law. The sample ballots shall be printed on paper of a different texture from the paper to the used for the official ballot.

(c) ~~One~~ *Except as provided in Section 13230, one* sample *official primary* ballot ~~of the party to which the voter belongs, as evidenced by his or her registration,~~ shall be mailed to each voter entitled to vote at the primary not more than 40 nor less than 10 days before the election. ~~A nonpartisan sample ballot shall be so mailed to each voter who is not registered as intending to affiliate with any of the parties participating in the primary election.~~

SEC. 9. Section 13301 of the Elections Code is amended to read:

13301. (a) At the time the county elections official prepares sample ballots for ~~each political party at~~ the presidential primary, he or she shall also prepare a list *with the name* of candidates for delegates for each political party. The names of the candidates for delegates of any political party shall be arranged upon the list of candidates for delegates of that party in parallel columns under their preference for President. The order of groups on the list shall be alphabetically according to the names of the persons they

prefer appear upon the ballot. Each column shall be headed in boldface 10-point, gothic type as follows: "The following delegates are pledged to _____." (The blank being filled in with the name of that candidate for presidential nominee for whom the members of the group have expressed a preference.) The names of the candidates for delegates shall be printed in eight-point, roman capital type.

(b) Copies of the list of candidates for delegates of each party shall be submitted by the county elections official to the chairman of the county central committee of that party, and the county elections official shall post a copy of each list in a conspicuous place in his or her office.

SEC. 10. Section 13302 of the Elections Code is amended to read:

13302. The county elections official shall forthwith submit the sample *official primary* ballot ~~of each political party~~ to the chairperson of the county central committee of ~~that~~ *each political* party, and shall mail a copy to each candidate for whom nomination papers have been filed in his or her office or whose name has been certified to him or her by the Secretary of State, to the post office address as given in the nomination paper or certification. The county elections official shall post a copy of ~~each~~ *the* sample ballot in a conspicuous place in his or her office.

SEC. 11. (a) No provision of this act may be changed except by a vote of the people.

(b) The Legislature shall amend or delete other provisions of law not encompassed by this act which conflict

with the provisions herein in order to bring them into conformity with this act.

SEC. 12. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

* * * *

Supreme Court, U.S.
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No. 99-401

In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY,
CALIFORNIA REPUBLICAN PARTY,
LIBERTARIAN PARTY OF CALIFORNIA
and PEACE AND FREEDOM PARTY, et al.,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA
and CALIFORNIANS FOR AN OPEN PRIMARY, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents agree with petitioners' characterization of the basic issue presented: Whether California's Open Primary Act, which allows all voters, including independents, to vote for any candidate for any office regardless of the voter's or the candidate's party of registration, violates the First and Fourteenth Amendments to the United States Constitution.

Petitioners assert that this case presents a second question: "Whether the associational rights of political parties are afforded less protection under the First Amendment than the associational rights of other private associations." It does not.

Political parties perform roles different from truly private organizations – functions which the courts below aptly characterized as "governmental" in nature. For example, qualified political parties in California are accorded automatic ballot access unavailable to private organizations wishing to place candidates on the ballot. As a condition of accepting automatic ballot access, political parties are required to conduct their nominations through a primary process open to all voters. However, if a political party in California genuinely desires to be treated the same as other "private" associations, it is free to forego automatic ballot access via the open primary and instead place its candidates on the ballot by circulating nominating petitions.

Thus, characterizing the question as to whether the associational rights of political parties are afforded "less

QUESTIONS PRESENTED – Continued

protection" than other private associations is misleading. The Ninth Circuit more accurately described petitioners' position: "The parties contend that their interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how [the Open Primary Act] will work in practice, the blanket primary must be unconstitutional on its face."

LIST OF PARTIES

Petitioners are the California Democratic Party, the California Republican Party, the Libertarian Party of California, the Peace and Freedom Party, Art Torres, Kathy Bowler, Paul Jorjorian, Gail Lightfoot, and C.T. Weber.

Respondents are Bill Jones, Secretary of State of California, and Californians for An Open Primary.

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BRIEF IN OPPOSITION

Respondents respectfully file this brief in opposition to the petition for writ of certiorari to review the unanimous judgment of the United States Court of Appeals for the Ninth Circuit.

JUDGMENT BELOW

The Ninth Circuit's opinion, reported at *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999), is included at Appendix A hereto. The District Court's opinion is reported at *California Democratic Party v. Jones*, 984 F.Supp. 1288 (E.D. Cal. 1997).

CONSTITUTIONS, STATUTES OR REGULATIONS

This case involves the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, and California's Open Primary Act, an initiative measure (Proposition 198) adopted by California's voters on March 26, 1996. The Open Primary Act provides in relevant part:

> All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified

to vote, for any candidate regardless of the candidate's political affiliation. Cal. Elec. Code § 2001.[1]

The text of the Open Primary Act is provided at Appendix D to the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Introduction

In 1996 the citizens of California concluded that the closed primary then used to select candidates for public office effectively disenfranchised millions of voters and produced government officials unrepresentative of the electorate at large. The voters overwhelmingly adopted the Open Primary Act to enhance the democratic nature of the State's election process and the representativeness of its elected officials.[2]

Petitioners, political parties and officials, assert that the blanket primary is unconstitutional on its face. This must come as a surprise to Washington and Alaska,

[1] All statutory references are to the California Elections Code.

[2] California utilizes what political scientists call a "blanket" primary, which allows all voters, including independents, to vote for any candidate for ***any office*** regardless of the candidate's affiliation. § 2001. The top vote-getter of each party goes on to the general election. § 15451. Washington and Alaska are the only other states which also employ the blanket primary; Louisiana uses a variant.

By comparison, in an "open" primary any voter may request the ballot for ***any party***, but may only vote in one party's primary election. App. at 11-12.

which have used the blanket primary for over 60 years. No court has even intimated that the blanket primary is unconstitutional per se. Indeed, every court which has addressed the issue has concluded that the blanket primary does not violate the First Amendment associational rights of political parties. There is thus no conflict in decisions on the issue.

The courts below carefully assessed the potential burden posed to petitioners and then balanced the interests of California's voters. Both the District Court and Ninth Circuit correctly decided that the blanket primary does not violate petitioners' First Amendment associational rights. Accordingly, the petition for writ of certiorari should be denied.

B. Proceedings Below

The District Court rejected petitioners' assertion that allowing non-party members to vote in a party's primary renders the blanket primary facially unconstitutional. App. at 20 and 25. The court noted that twenty-one states utilize open primaries allowing participation by non-party members. *Id.* at 11. Under petitioners' theory, these primary schemes would also be unconstitutional per se. Rather, the court concluded that, in order to assess petitioners' challenge, it must look instead to how voters will actually behave under California's blanket primary. *Id.* at 25.

The District Court received extensive testimony and documentary evidence from party officials, political scientists, campaign consultants and elections officials regarding the expected operation of California's blanket

primary. This was based, in part, on experience in the states of Washington and Alaska, which have utilized blanket primaries since 1935 and 1947, respectively.

The court correctly applied the "flexible" balancing test articulated by this Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), for assessing the potential impact of the blanket primary upon petitioners. App. at 17-18.[3]

Petitioners assert that the blanket primary will have a "destructive effect" on California's political parties, with crossover voting and raiding affecting the selection and behavior of nominees and party officials, weakening party discipline, increasing the cost of primary elections, dampening the morale of party activists and disrupting internal party governance. *Id.* at 26-27.

The court termed petitioners' characterization "overdrawn." *Id.* at 27. The court found that California's blanket primary is a non-discriminatory measure, adopted by the overwhelming majority of voters, which will not diminish the efficacy or strength of political parties in California by "any substantial degree." *Id.* at 35. The

[3] "In evaluating the constitutionality of Proposition 198, the court therefore must first determine the character and magnitude of the burdens imposed by the blanket primary on the associational rights of the political parties. The court then must consider the State's interests and weigh the strength of those interests against the particular burdens placed on the parties' associational rights. The greater the intrusion on the parties' associational rights, the greater must be the State's interests and the more narrowly tailored must be the Proposition to advance those interests." App. at 18.

Open Primary Act was intended to enhance the democratic nature of California's election process and the representativeness of its elected officials. *Id.* at 39. These state interests are compelling and outweigh the interest which parties have in controlling who votes in their primary. *Id.* at 42 and 44.

The Ninth Circuit reviewed de novo the constitutionality of the blanket primary and the District Court's determinations on questions of law and mixed questions of law and fact. *Id.* at 4. After considering the record and briefs, the Ninth Circuit affirmed and adopted the "careful, detailed and eloquent" opinion of the District Court as its own. *Ibid.*

Petitioners' petition for rehearing en banc was denied, with no judge on the Ninth Circuit requesting a vote on the petition.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY FOUND THAT CALIFORNIA'S OPEN PRIMARY ACT DOES NOT VIOLATE PETITIONERS' FIRST AMENDMENT RIGHTS

A. Proposition 198 Poses No First Amendment Issue Because It Was Approved By The Party Membership

The Open Primary Act was adopted by California's voters in March of 1996 by a vote of 59.51 percent to 40.49

percent. It received a majority in every demographic subgroup: sex, age, race, education, political ideology, income, religion, and, most tellingly, ***party identification***. App. at 9-10. In particular, 69 percent of Independents, 61 percent of Democrats and 57 percent of Republicans carried the initiative. *Ibid.* Given the ballot arguments for and against the measure, the court found that the voters were not misled or inadequately advised as to its purpose and effect. *Id.* at 9, fn. 6.

It is not surprising that such large majorities of party members voted against petitioner party leaders in adopting the blanket primary. Rank-and-file members have different interests than party leaders. Here, the members simply reached a different conclusion in balancing what was best for their party, for themselves as voters, and for California.

For example, the blanket primary gives every voter, including party members, more choices on the ballot. From a voter's perspective, more choice is better. The blanket primary also empowers party members who belong to minority parties in districts safely held by another party. Approximately one-quarter of all of California's voters fall into this category, effectively disenfranchised by having no say in the election of their governmental officials. App. at 39. To these party members, the blanket primary allows a meaningful say in who represents them without forcing them to abandon their political affiliation.

Despite the party rank-and-file's strong support for the blanket primary, petitioner party leaders now ask this Court to overturn it. In the words of petitioners' expert,

"sovereignty" belongs to the party as organization, not to its members. RT at 392.[4]

Petitioners' attempt to impose their will upon their own party members is fundamentally at odds with the First Amendment. As this Court has made clear, collective entities, like political parties, enjoy associational rights in order to more effectively promote the interests of their ***members***. "The [organization] is but the medium through which its individual members seek to make more effective the expression of their views." *NAACP v. Alabama*, 357 U.S. 449, 459 (1957); *see also, Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (per curiam). The members' interests are primary. Since political parties exist to advance their members' shared political beliefs, *Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring in the judgment and dissenting in part), their associational rights cannot be asserted to defeat their members' will.

Petitioners' challenge thus fails at the outset.

B. The Open Primary Act Does Not Impermissibly Burden The Parties' Associational Interests

Petitioners' challenge presents a simple issue: What are primaries for? App. at 15. Respondents contend the primary is the first, critical step in the electoral process. Its function is to choose people to run government, and it is often the most important step in the electoral process. "As a practical matter, the ultimate choice of the mass of

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[4] "RT" refers to the Reporter's Transcript filed in the Court of Appeals.

voters is predetermined when the nominations [by the political parties] have been made." *Morse v. Republican Party*, 517 U.S. 186, 205 (1986) (opinion by Stevens, J.).

The parties' challenge rests on the sweeping proposition that, ***as a matter of law***, a critical step in the electoral process must be run however they want. Petitioners assert that parties have "allowed" nomination by primary vote, but can "rescind" that decision and nominate by caucus or convention if they desire. RT at 392.

The logic of this claim is troubling in many ways. It would invalidate not just blanket primaries, but open primaries and, indeed primaries altogether if the parties so desire.[5]

[5] The Court of Appeals thought this reason enough to reject the parties' challenge.

> The parties contend that their interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how Proposition 198 will work in practice, the blanket primary must be unconstitutional on its face. . . . If this were true, then open primaries would also be unconstitutional upon any party's objection: an open primary, every bit as much as a blanket primary, permits voters who are not registered in a party to vote in that party's primary. But many of the States have some version of an open primary and to invalidate them all on this theoretical ground would be an extraordinary intrusion into the complex and changing election laws of the States and would remove from the American political system a method for candidate selection that many States consider beneficial and which in the uncertain future could take on new appeal and importance.

App. at 21.

No court has held that the First Amendment stretches so far, and for good reason. Recognizing the absolute primacy of a political party's rules over conflicting state law would allow parties to overthrow almost any State regulation of primary elections, even rules requiring them to nominate by direct primary, to accept votes from party members that the parties may want to exclude, and to count only registered voters.

It is too late in the day to argue that political parties are purely private entities with a right to so control primary elections. As this Court has recognized, "[t]he primary election . . . in California . . . is 'an integral part of the entire election process . . . [that] functions to winnow out and finally reject all but the chosen candidates.' " *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986) (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992). Because of the role the State confers upon political parties in the electoral process, they are not simply private actors. Only parties get automatic ballot placement for their candidates, and only parties seek, as their ultimate goal, to obtain control of the levers of government.

Courts have thus already rejected petitioners' basic argument. *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) (upholding direct primary over party's objection); *Smith v. Allwright*, 321 U.S. at 649 (striking down party's exclusion of blacks from primary). When they nominate candidates, established political parties are subject to a wide range of State regulation, *see, Morse v. Republican Party*, 517 U.S. at 218; *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157-58 (1978), and do not have

unfettered control over who can participate in their activities. *See, Terry v. Adams*, 345 U.S. 461 (1953); *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994).

C. The Asserted Harms To Parties Are Insubstantial Or Hypothetical

The parties assert that the blanket primary will result in a parade of horribles. The District Court, however, found that the blanket primary is not likely to prove "severe or debilitating" to California's political parties. App. at 35.

Much attention was given to crossover voting. The court found the parties' characterization of the likely amount or effects of crossover voting due to a blanket primary to be "overdrawn." *Id.* at 27. Indeed, petitioners' expert acknowledged that crossover voting generally does not change the outcome of elections; it merely accentuates the margin of victory. RT at 488.[6] So too, the court found "almost unanimity" among the experts that there is little evidence raiding will be a factor in California's

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[6] Petitioners cited only three races in the past 60 years under the Alaska and Washington blanket primaries which arguably were determined by crossover voting: Washington Governor Clarence Martin in 1936, Alaska Governor J. Hammond in 1974, and Washington Governor Dixie Lee Ray in 1976. ***In each instance, the nominee went on to win the general election, giving the voters their candidate of choice.*** RT at 517 and 543-544. The First Amendment certainly does not prohibit a majority of voters from coalescing to nominate and elect their most preferred candidate.

blanket primary. App. at 28.[7] In short, the court concluded, "The parties do not show that the blanket primary is significantly different theoretically or practically from the open primary." App. at 35-36.

D. Washington's Experience Refutes Petitioners' Challenge

By every indication, the blanket primary has worked well in the State of Washington for over 60 years. As this Court observed, the blanket primary has resulted in neither the "destruction of the integrity of the election process," nor "the decay of responsible party government." *Tashjian v. Republican Party*, 479 U.S. 208, 223, fn. 12 (1986)

Petitioners' experts acknowledged that Washington enjoys a healthy, two-party democracy. RT at 490. Indeed, to the extent that political systems can be rated, Washington's has been ranked as "more democratic" than California's. *See, e.g.*, Hill, *Democracy in the Fifty States* (Univ. Neb. Press 1994). App. at 35.

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[7] This finding confirms the conclusion reached by other courts which have addressed the issue. *Tashjian v. Republican Party*, 479 U.S. 208, 219, fn. 9 (1986); *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122, fn. 23 (1981); *O'Callaghan v. State*, 919 P.2d 1250, 1261 (Alaska 1996) (upholding Alaska's blanket primary); *State ex rel. LaFollette v. Democratic Party*, 287 N.W.2d 519, 533 (Wis. 1980), *rev'd on other grounds, Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

Petitioners' experts acknowledged that the vast majority of voters who cross over do so simply to vote for the candidate they most prefer. RT at 486.

E. The Parties May Avoid The Associational Burdens They Fear

California state courts have recognized that a political party can avoid the primary process by declining to seek qualified party status. If it does not do so, it is free to support and nominate candidates through the independent candidate approach, using a private primary, convention, caucus or any other mechanism. *Green Party v. Jones*, 31 Cal.App.4th 747, 755, fn. 9, 37 Cal.Rptr.2d at 411, fn. 9 (1995). So long as the group satisfies the State's nominating petition requirements, its candidate will reach the general election. *See*, § 8400 et seq.

Petitioners do not want to pursue this option because they reap great advantages from their status as qualified parties, particularly automatic ballot access for their candidates. But petitioners cannot have it both ways. So long as the State is pursuing legitimate objectives and not discriminating among groups, parties participating in the primary must accept reasonable regulation of the electoral process. *See, Morse v. Republican Party*, 517 U.S. at 198 (opinion of Stevens, J.) ("If the Party chooses to avail itself of [automatic ballot access], it necessarily become subject to . . . regulation."); *Id.* at 238 (opinion of Breyer, J.) (party choice "to avail itself of special state-law preferences, in terms of ballot access and position[,]" among other factors, subjects party nomination process to state regulation).

F. The Blanket Primary Advances Compelling State Interests

Given petitioners' failure to establish that the blanket primary severely burdens party interests, the State need only show that it advances important regulatory interests. *Timmons*, 520 U.S. at 358; *Burdick*, 504 U.S. at 434. Here, the record established that the blanket primary advances several important interests enhancing the democratic nature of California's election process.

1. The Blanket Primary Will Produce Officials Who Better Represent The Electorate

First, the blanket primary advances one of the most important goals of any election process – ensuring the representativeness of elected officials. App. at 40-41. This Court has long recognized that the State may regulate the election process to ensure elections effectively translate the will of the electorate. *Storer*, 415 U.S. at 732.

Enhanced representativeness helps maintain the stability of the political system, *Storer*, 415 U.S. at 736, and the State also has a valid interest in preserving the integrity of the electoral process. *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973). But an electoral process can hardly be said to have integrity if it does not assure that the officials elected are representative of the people to be governed. The Court of Appeals explained:

> The voters' belief in the fairness of the election process is also a substantial state interest; it is apparent that the voters of California believe

> that the system is fairer when all voters, including independents and regardless of party affiliation, may participate in framing the choice of candidates at the general election. App. at 43.

By affording all voters the opportunity to consider all of the participating candidates, the blanket primary generates election outcomes that are more closely aligned with true voter preferences. *See, Illinois State Board of Elections*, 440 U.S. 173, 185 (1979) (observing that expanding choices in an election fosters the voter's ability to express political preferences). The record demonstrates that officials elected under blanket primaries stand closer to the median policy positions of their districts than do those elected under closed primaries. App. at 41, fn. 34. As the court found: "[T]he people of California agree that a blanket primary system will lead to the election of more representative 'problem solvers' who are less beholden to party officials and 'special groups.' " App. at 41.

Petitioners do not dispute that the blanket primary tends to produce candidates who are more reflective of the total electorate. Instead, they twist that virtue and mischaracterize the State's goal as restructuring its electoral process to favor candidates of a particular philosophy.

The blanket primary aims not to produce more moderate candidates, but rather candidates who are ***more representative of the electorate***. Since most of the electorate lies near the center of the ideological spectrum, the more representative candidate will often appear the more "moderate." However, "reflective" and "moderate" are not synonymous. Petitioners' own experts pointed to

numerous candidates who benefitted from crossover voting who are not "moderates:" George Wallace, Eugene McCarthy, Gary Hart, Ronald Reagan, and Jerry Brown. ER Vol. II, No. 17, at 482-483[8]; RT at 292-294.

2. The Blanket Primary Provides An Effective Vote To Disenfranchised Voters

The blanket primary will give millions of citizens a more effective vote. California's closed primary disenfranchised one-quarter of the State's registered voters by denying them effective participation in a critical step of the election process. App. at 39-40.

These voters were either registered as independents (approximately 11% of California's electorate), or lived in districts "safe" for another party. *Ibid.* In California, a majority of congressional, state senate and assembly districts are considered safe for one party. RT at 851-852. Such voters could not vote in the primary in any way that mattered in deciding who would eventually represent them. This Court has noted the political disadvantages suffered by such voters in safe districts. *Davis v. Bsandemer*, 478 U.S. 109, 170 (1986) (Powell, J., concurring and dissenting).

Petitioners' experts acknowledged that the blanket primary opens up a determinative stage of the electoral process to these voters who previously had no real say in the choice of their representative. Some 3.5 to 4.4 million

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[8] "ER" refers to the Excerpts of Record filed in the Court of Appeals.

California voters can now participate fully in the selection of the person who will represent them in government. RT at 239-241.

3. The Blanket Primary Will Increase Voter Participation

Finally, the blanket primary will increase voter turnout. During the past thirty years, California has witnessed a 15-20 percent decline in voter participation in both primary and general elections. RT at 658, 661-662. As petitioners concede, allowing 1.5 million independent voters in the blanket primary will boost participation. RT at 372. So too, increasing the number of candidates and the competitiveness of elections will increase voter turnout. App. at 42.

The court correctly found the State's interests here are "compelling," and outweigh the acknowledged substantial interest which parties have in controlling who votes in the primary. App. at 42. Accordingly, the decision below correctly rejected petitioners' First Amendment challenge on the merits. The petition for writ of certiorari should thus be denied.

II.

THE BLANKET PRIMARY IMPOSES NO PARTICULAR HARM ON MINOR PARTIES

Petitioners contend that the blanket primary will particularly harm minor parties. This, too, is without foundation. The District Court found that nothing suggests

crossover voting in minor party primaries will be widespread, much less negatively impact these parties or their candidates. App. at 31, fn. 26.

First, minor parties seldom have contested primaries. In the approximately 2,000 partisan primary races in California in which minor parties have fielded candidates since 1968, only 102, approximately 5 percent, have been contested. RT at 618, 630-631. *Id.*[9] If there is only one candidate in the race, crossover voting obviously will not change the outcome.

Furthermore, minor parties in California field candidates in partisan elections primarily to recruit members and spread the party's message. RT at 615-616 and 632. This is not to say that minor parties have any lesser rights than major parties, but only that there is very little likelihood of harm by crossover voting or raiding. RT at 427.

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[9] As this Court noted in discussing Washington's blanket primary, the focus of the primary is on contested races between candidates for the nomination of the major parties, not on minor party races. *Socialist Workers Party v. Secretary of State*, 765 F.2d 1417, 1421 (9th. Cir. 1985), *rev'd on other grounds, Munro v. Socialist Workers Party*, 479 U.S. 189 (1996).

III.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THIS COURT, ANOTHER UNITED STATES COURT OF APPEALS, OR A STATE COURT OF LAST RESORT

A. The Decision of The Court of Appeals Does Not Conflict With Decisions of This Court

This Court has never directly addressed the constitutionality of the blanket primary.[10] Petitioners nevertheless allege that the holding below "cannot be squared" with two decisions of this Court. Petitioners' argument is misplaced.

Petitioners first cite this Court's decision in *Tashjian v. Republican Party*, 479 U.S. 208 (1986), as supporting their position. It does not.

In *Tashjian*, Connecticut State Democratic officeholders blocked Republican attempts to allow independent voters to participate in the Republican primary. *Tashjian*, 479 U.S. at 212-213, fn. 4. Considering whether Democrats could act through the State to bar Republicans from expanding their electoral base, this Court carefully defined the associational interest at stake. The Republican Party's interest lay not in generally determining who could participate in the selection of its candidates, but more specifically in not having that group of voters "limit[ed.]" *Tashjian*, 479 U.S. at 215-216.

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[10] However, this Court has noted that the open primary may well serve compelling State interests. *Democratic Party v. Wisconsin ex rel. LaFolette*, 450 U.S. at 120-121.

Recently this Court reiterated the narrow scope of *Tashjian* when it rejected a challenge to Minnesota's anti-fusion statute:

> [I]n *Tashjian*, we held that Connecticut's closed-primary statute, which required voters in a party primary to be registered party members, interfered with a party's associational rights ***by limiting "the group of registered voters whom the Party may invite to participate in the basic function of selecting the Party's candidates."***

Timmons, 520 U.S. at 360 (emphasis added) (quoting *Tashjian*, 479 U.S. at 215-216).

Tashjian, then, hardly identifies the parties' associational interest as a sweeping right to control who may vote in primaries. Rather *Tashjian* and *Timmons* identify the interest more specifically as one against having the party's electoral base restricted against its wishes. As *Tashjian* notes, limiting those to whom the party may appeal for support impairs the party's "appeal to common principle [which] may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 216. The interest runs not to the party's right to control who can participate in a critical step of the electoral process, but rather to the ultimate competitiveness of the party's candidates in the general election. The State simply does not have a right – over a party's objection – to ***limit*** the range of voters a primary candidate can appeal to. By opening up the primary, however, the blanket primary promotes, not impairs, this interest.

Petitioners next cite this Court's decision in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S.

214 (1989), as barring the blanket primary. But in *Eu*, this Court struck down a statute prohibiting parties from endorsing candidates in primaries and dictating the organization and composition of party governing bodies. The case did not involve who could vote in primaries, only whether parties could speak to their members and whether parties could manage their internal organization as they thought best – areas the Open Primary Act carefully avoids.[11] Indeed, this Court noted that a party's interest in controlling its internal organization was much different from ***and stronger than*** the party interests at stake in the primary election in *Tashjian*. *Eu*, 489 U.S. at 230.

B. The Decision of The Court of Appeals Does Not Conflict With Decisions of Other United States Courts of Appeals

No United States Court of Appeals, other than the Ninth Circuit in the instant case, has addressed the constitutionality of the blanket primary. There is thus no conflict between circuits. Nor is it likely that there will be, because the only other states which use a blanket primary such as California's are Alaska and Washington. App. at 12. Both of these states are within the Ninth Circuit.

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[11] Under the Open Primary Act, election of party central committees remains limited to party members. § 13300.

C. The Decision of The Court of Appeals Does Not Conflict With Decisions of State Courts of Last Resort

The state supreme courts of Washington and Alaska have examined the constitutionality of the blanket primary and both have upheld this system as constitutional, rejecting similar First Amendment challenges brought by political parties in those states. *See O'Callaghan v. Alaska*, 914 P.2d 1250 (Alaska 1996), *cert. denied*, 520 U.S. 1209 (1997); *Heavey v. Chapman*, 93 Wash. 2d 700, 611 P.2d 1256 (1980); *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936).

With no conflict between the decision of the Court of Appeals below and any decision of this Court, another United States Court of Appeals or any state court of last resort, the Petition for writ of certiorari should be denied.

CONCLUSION

The District Court considered extensive evidence from experts including party leaders, political scientists, politicians and political consultants as to the likely effects of California's blanket primary. The District Court and Court of Appeals, de novo, found that California's Open Primary Act, adopted by a majority of voters from all major parties, does not severely burden petitioners' associational rights and advances compelling state interests in enhancing the democratic nature of California's election process. The courts below correctly concluded that California's Open Primary Act withstands petitioners' First Amendment challenge.

This decision confirms prior holdings by the Alaska and Washington State Supreme Courts reviewing blanket primaries used in those states since 1935, and does not conflict with any decision by this Court or any United States Court of Appeals.

Accordingly, the petition for writ of certiorari should be denied.

Dated: November 3, 1999.

Respectfully submitted,

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APPENDIX A

CALIFORNIA DEMOCRATIC PARTY; ART TORRES; KATHY BOWLER; PAUL JORJORIAN; PEACE AND FREEDOM PARTY; C.T. WEBER; LIBERTARIAN PARTY OF CALIFORNIA; GAIL LIGHTFOOT,

Plaintiffs,

and

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER; SHAWN STEEL; DONNA SHALANSKY,

Plaintiffs-Intervenors-Appellants,

v.

BILL JONES, SECRETARY OF THE STATE OF CALIFORNIA,

Defendant-Appellee.

97-17442

D.C. No. CV-96-02038-DFL

Appeals from the United States District Court for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
October 7, 1998-San Francisco, California

Filed March 4, 1999

Before: Proctor Hug, Jr., Chief Judge, Betty B. Fletcher and Stephen S. Trott, Circuit Judges.

Opinion by Judge B. Fletcher

APPENDIX A

CALIFORNIA DEMOCRATIC PARTY; Art Torres; Kathy Bowler; Paul Jorjorian; Peace And Freedom Party; C.T. Weber; Libertarian Party Of California; Gail Lightfoot,

Plaintiffs-Appellants,
and
California Republican Party, Michael Schroeder; Shawn Steel; Donna Shalansky,
Plaintiffs-Intervenors,
v.
Bill JONES, Secretary of the State of California,
Defendant-Appellee,
v.
Californians For An Open Primary, Defendant-Intervenor-Appellee.
California Democratic Party; Art Torres; Kathy Bowler; Paul Jorjorian; Peace And Freedom Party; C.T. Weber; Libertarian Party Of California; Gail Lightfoot,
Plaintiffs,
and
California Republican Party, Michael Schroeder; Shawn Steel; Donna Shalansky,
Plaintiffs-Intervenors-Appellants,
v.
Bill Jones, Secretary of the State of California,
Defendant-Appellee.
Nos. 97-17440, 97-17442,
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Oct. 7, 1998.
Decided March 4, 1999.

Action was brought challenging constitutionality of California proposition which converted the State's primary election from a closed to a blanket primary in which voters may vote for any candidate regardless of the voter's or candidate's party affiliation.

Proposition was upheld by the United States District Court for the Eastern District of California, David F. Levi, J., 984 F.Supp. 1288, and plaintiffs appealed. The Court of Appeals, Fletcher, Circuit Judge, adopting the opinion of the District Court, held that the proposition is not unconstitutional as violating the First Amendment right of association.

Affirmed.

George Waters, Olson, Hagel, Leidigh, Waters & Fishburn, Sacramento, California, for plaintiffs-appellants.

Cyrus J. Rickards, Deputy Attorney General, Sacramento, California, for defendant-appellee.

John E. Mueller, Nielsen, Merksamer, Parrinello, Mueller & Naylor, Mill Valley, California, for intervenors-plaintiffs-appellants.

James P. Clark, Gibson, Dunn, & Crutcher, Los Angeles, California, for intervenor-defendant-appellee.

James L. Baldwin, Assistant Attorney General, for Amicus, State of Alaska.

Jeffrey T. Even, Assistant Attorney General, for Amicus, State of Washington.

Appeals from the United States District Court for the Eastern District of California; David F. Levi, District Judge, Presiding.

D.C. No. CV-96-02038-DFL.

Before: HUG, Chief Judge, FLETCHER and TROTT, Circuit Judges.

FLETCHER, Circuit Judge:

In 1996 California voters passed Proposition 198, which converted the State's primary election from a closed to a blanket primary in which voters may vote for any candidate regardless of the voter's or candidate's party affiliation. Appellants, the California Democratic, Republican, Libertarian, and Peace and Freedom Parties, together with other individuals, opponents of Proposition 198, seek reversal of the district court's judgment upholding its constitutionality. *California Democratic Party v. Jones*, 984 F.Supp. 1288 (E.D.Cal.1997). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

STANDARD OF REVIEW

We review the constitutionality of a statute de novo. *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir.1996), cert. denied, 520 U.S. 1117, 117 S.Ct. 1249, 137 L.Ed.2d 330 (1997). A district court's determinations on questions of law and on mixed questions of law and fact that implicate constitutional rights are also reviewed de novo. *Neal v. Shimoda*, 131 F.3d 818, 823 (9th Cir.1997); *Jacobsen v. United States Postal Serv.*, 993 F.2d 649, 653 (9th Cir.1992). We have undertaken that review.

CONCLUSION

We have reviewed the briefs to this court, the record made before the district court, and the careful, detailed,

and eloquent opinion of the district court. Because we concur in it in every respect, we have elected to adopt it as the opinion of our court.

We attach it as an appendix. It also may be found at 984 F.Supp. 1288 (E.D.Cal.1997) sub nom. *California Democratic Party v. Jones*. The judgment of the district court is AFFIRMED.

ATTACHMENT

APPENDIX

CALIFORNIA DEMOCRATIC PARTY, Art Torres, Kathy Bowler, Paul Jorjorian, Peace and Freedom Party, C.T. Weber, Libertarian Party of California and Gail Lightfoot, Plaintiffs,

v.

Bill JONES, Secretary of State of the State of California, Defendant.

California Republican Party, Michael Schroeder, Shawn Steel and Donna Shalansky, Intervenors/Plaintiffs, Californians for an Open Primary, Intervenor/Defendant.

No. CIV. S-96-2038 DFL.

United States District Court,
E.D. California.
Nov. 17, 1997.
As Corrected Nov. 24, 1997.

MEMORANDUM OF OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

LEVI, District Judge.

In March of 1996, the people of the State of California, by a wide margin, adopted Proposition 198, an

initiative statute known as the Open Primary Act. Proposition 198 converts the State's primary election from a closed to an open or blanket primary in which voters may vote for any candidate regardless of the candidate's or the voter's party affiliation. In a blanket primary under Proposition 198, one ballot will be prepared at the primary election for all voters just as in the general election. Because a blanket primary permits voters to vote in the primary election of a party without being registered in that party, the political parties and party officials who bring this action contend that Proposition 198 violates their right of association guaranteed by the First Amendment of the Constitution.

The court concludes that Proposition 198 withstands this constitutional challenge.

I.

Under Proposition 198 "All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation."[1] By this language and the conforming amendments to the State Election Code, Proposition 198 changed the California primary

[1] Proposition 198 added to the Election Code the language quoted in text as a new § 2001. The Proposition also made conforming amendments to §§ 2151, 13102, 13203, 13206, 13230, 13300, 13301, and 13302. *See* Defs.' Ex. A.

from a closed to an open or blanket system.[2] As the Legislative Analyst explained in the ballot pamphlet distributed to voters before the election, under the closed system "[i]n order to vote in primary elections for partisan offices, a voter must have identified a political party affiliation when registering to vote and can vote only for candidates of that party." Defs.' Ex. A at 5. Thus, for example, in the closed primary a registered Democratic Party voter receives a ballot that includes only candidates competing for the Democratic Party nomination. Only registered Democrats could vote for these candidates, and the winner of the primary would be the Democratic Party's candidate at the general election.[3] By contrast, the Legislative Analyst explained, in the blanket primary instituted by Proposition 198:

> [A]ll persons who are entitled to vote in primary elections, including those not affiliated with a political party [are allowed to] vote for any candidate regardless of the candidate's political party affiliation. Thus, voters

[2] California has had a closed primary since 1909 when the State substituted direct nomination of candidates by primary elections in place of nominating conventions held by the political parties. In 1900 California briefly experimented with a blanket primary, but the California Supreme Court held it unconstitutional under the State Constitution. *See Britton v. Board of Election Comm'rs*, 129 Cal. 337, 346-47, 61 P. 1115 (1900). No claim is made under the State Constitution in the present case.

[3] Cal. Elec.Code § 15451 provides: "The person who receives the highest number of votes at a primary election as the candidate of a political party for nomination to an office is the nominee of that party at the ensuing general election."

in primary elections would be allowed to vote for candidates across political party lines. Furthermore, the initiative provides that county elections officials prepare only one ballot for all voters. The candidates for an office would be listed randomly on the ballot and not grouped by political party affiliation. The candidate of each political party who receives the most votes for a state elective office becomes the nominee of that party at the next general election. Defs.' Ex. A at 5. Therefore, in the blanket primary after Proposition 198, a registered Democratic Party voter, for example, could vote for a Republican Party candidate for Governor and a Democratic Party candidate for Assembly, and so on down the ballot.

An independent voter could do the same.[4] Through such cross-over voting, it is possible under the blanket primary for independent voters and voters registered in one party to participate in the primary election of another party.

In the statement of support included in the ballot pamphlet, proponents of Proposition 198 argued that the closed primary "favors the election of party hard-liners, contributes to legislative gridlock, and stacks the deck against more moderate problem-solvers." The open primary would permit voters to vote "for the best candidate for each office, regardless of party affiliation" thereby giving voters greater choice. In addition, according to proponents, the blanket primary would increase voter

[4] The election of political party committee members is not affected by Proposition 198. As to these party offices, voters may only vote for candidates of their own party registration.

participation in the primary election, restore healthy competition particularly in "safe" legislative districts in which one party clearly dominates, make elected officials more responsive to voters as opposed to party officials, reduce the power of special interest groups, and strengthen the political parties by assuring the nomination of candidates with broader bases of support. Opponents of Proposition 198 contended that it would work an unconstitutional interference with the right of the parties to choose their nominees:

> "Allowing members of one party a large voice in choosing another party's nominee – which Proposition 198 would do – is like letting UCLA's football team choose USC's head coach!"[5]

According to the opponents, the existing closed primary provided a "real choice" among candidates of different parties while a blanket primary would be "an invitation to political mischief" by special interests and political consultants. Defs.' Ex. A at 6-7.[6]

At the election, Proposition 198 was adopted by a convincing margin of those voting – 59.51 percent

[5] "Should Democrats be allowed to nominate Republican candidates for office? No! Should Republicans be allowed to nominate Democratic candidates for office? No!" Defs.' Ex. A at 7.

[6] In light of the arguments for and against presented in the ballot pamphlet, it cannot fairly be argued that the voters were misled or inadequately advised as to the effects and purposes of Proposition 198. Compare *Jones v. Bates*, 127 F.3d 839 (9th Cir.1997), reh'g granted, 129 F.3d 494 (1997) (majority of panel concludes that voters were not adequately advised as to effect of Proposition 140, the term limit initiative).

(3,340,642 votes) to 40.49 percent (2,273,064 votes). According to reliable exit polls, Proposition 198 was supported by 61 percent of Democrats, 57 percent of Republicans, and 69 percent of Independents. The measure was supported by a majority of every demographic subgroup, including groupings by sex, age, race, education, political ideology, income, religion and party identification. Defs.' Exs. B & D. Proposition 198 commanded majorities in every county in California and in 75 of the 80 Assembly districts. Defs.' Ex. I. Although the turnout by California's six minor parties was too small to sample, given the broad public support for Proposition 198 among all groups of every sort, it is likely that a majority of the members of these parties also favored the initiative. R.T. at 847 (Testimony of Thomas Quinn). Moreover, the vote on Proposition 198 reflects the long-standing support for an open primary among California voters. According to Mervin Field, an eminent California political polling expert, Californians have favored an open primary by wide margins since at least 1983. *See* Defs.' Exs. L-2 & L-5.[7]

By passing Proposition 198, California joined a small group of states, consisting of Alaska, Louisiana, and Washington, who also have blanket or nonpartisan primary elections. The other states have either a closed or an

[7] Mervin Field testified at the trial to his conclusion that as to Proposition 198 "there was remarkable consistency over a 13-year period, and that when the vote on Prop 198 was in, comparing that with the study that we did then 13 years prior, it showed that this concept, as it's posed here, and as it was posed in 198, struck a deep-seated chord with the voting public." R.T. at 645.

open primary, or some variant of the closed or open primary.[8] In the classic closed primary, such as California had prior to Proposition 198, participation in a party's primary election is limited to voters who have registered as members of that party a specified period of time prior to the primary election. Fifteen states have closed primaries of this kind. *See* Defs.' Ex. E, Gerber Report, at 2-4. Eight additional states have a "semi-closed" primary: participation in a party's primary is limited to those who have registered as party members and independents. *Id.* Participation of registered members of other parties is not permitted.

In an open primary, a registered voter may request, on election day, the ballot for any party's primary in which the voter intends to vote, whether or not the voter previously has registered as a member of that party; however, the voter may only vote in one party's primary election. Twenty-one states have an open primary in this sense of the term. *Id.*[9] Finally, four states have blanket or

[8] "The distinctions between open and closed primaries are easy to exaggerate. Too simple a distinction ignores the range of nuances and varieties within the closed primary states." F. Sorauf, Party Politics in America 206 (4th ed.1980), quoted in *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 133 n. 8, 101 S.Ct. 1010, 1025 n. 8, 67 L.Ed.2d 82 (1981) (Powell, J., dissenting). Similarly, there are many variations within the open and blanket primary states.

[9] The open primary is sometimes defined more narrowly to include only those primaries in which the " 'voter is not required to declare publicly a party preference or to have that preference publicly recorded.' " *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 112 n. 4, 101 S.Ct. 1010, 1014 n. 4, 67 L.Ed.2d 82 (1981) (citation omitted).

nonpartisan primaries. The blanket primary is a version of the open primary in which the voter is not limited to the ballot of any single party. All voters receive the same ballot, and a voter is not limited to the candidates of any single party but may vote, as to each office contested, for any candidate regardless of party affiliation. This is the primary system in Washington and Alaska, and is the system adopted by Proposition 198. Alaska first adopted a blanket primary in 1947 and has had a blanket primary since that time with the exception of the period from 1960 to 1966 when it adopted a traditional open primary.

Washington has had a blanket primary continuously since 1935. Finally, Louisiana has a version of a blanket primary, a nonpartisan primary open to all registered voters. Similar to the blanket primary in the sense that a voter can vote for any candidate without regard to party affiliation and is not limited to one party's nominees, the nonpartisan primary differs because "[t]he two top vote receivers, regardless of party, meet in a subsequent (run-off or general) election." *Id.* at 3.

> "The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century and no consensus has as yet emerged." *Tashjian v.*

Approximately ten states have this kind of open primary. *See* Pls.' Ex. 7, Costantini Report at 3; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 222 n. 11, 107 S.Ct. 544, 552 n. 11, 93 L.Ed.2d 514 (1986). The other states follow practices that are sometimes classified as "semi-open" or "semi-closed." In these states the voter is permitted to request any party's ballot the day of the primary, but some record of the request is made or a public statement of party affiliation is made prior to voting.

> *Republican Party of Conn.*, 479 U.S. 208, 222, 107 S.Ct. 544, 552, 93 L.Ed.2d 514 (1986). It is apparent from this very case that the States continue to debate the question and to try new approaches.[10]

All of the four political party plaintiffs in this case have bylaws that prohibit persons who are not registered in their parties from voting in their parties' primary. Article X, § 8 of the By-Laws & Rules of the California Democratic Party states that "No person shall be entitled to vote for a Democratic candidate at a partisan primary election unless he or she is a registered Democrat." Pls.' Ex. 1 at 36. The Republican Party also disputes the legitimacy of an open or blanket primary: "The [State Central] Committee shall recognize only those partisan nomination processes under California law that limit the electorate for partisan nomination elections to registered Republican voters, and which do not impose upon the Committee, without its express concurrence, a nomination process open to voters registered in other parties or

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[10] When the Supreme Court decided Tashjian in 1986 it found that 21 states provided for the classic closed primary. According to Professor Gerber, as of 1990 the number of closed primaries had fallen to sixteen, including California. *See* Defs.' Ex. E., Gerber Report, at 2. Because it is not easy to classify the differing systems and because analysts use somewhat different definitions of the "closed" and "open" primaries, this change in numbers may be more the product of differing classification systems than changes in the states' election laws. The Tashjian Court also found that four states, including Virginia, had blanket primaries. The inclusion of Virginia as a blanket state appears to have been in error. *See* Va.Code § 24.1-182 ("No person shall vote for the candidates of more than one party.").

as decline to state." Defs.' Ex. § at 2. The Peace & Freedom Party State Central Committee By-Laws and the Libertarian Party of California Bylaws have similar provisions. *See* Pls.' Ex. 3 at 6, and Ex. 4 at 13.[11]

The California Democratic Party, the Peace and Freedom Party, and the Libertarian Party of California and certain of their officers brought this action against the Secretary of State of the State of California seeking a declaration that Proposition 198 is unconstitutional and requesting an injunction against its implementation.[12] The California Republic Party and certain of its officers intervened as plaintiffs. Californians For An Open Primary intervened as a defendant.[13] The court heard testimony over four days and has received numerous exhibits, including the reports of various experts.

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[11] The Democratic National Committee's charter requires that state party delegates to the national convention be chosen through "processes which . . . restrict participation to Democrats only." Pls.' Ex. 2 at 2 (Art. 2, § 4(e)). *See also* Pls.' Ex. 9 at 4 (Rules 2.A. and 2.B. of the Delegate Selection Rules). The Rules of the Republican Party have a similar rule against blanket and open primaries. *See* Defs.' Ex. T at 25 (Rule No. 34(f)).

[12] It appears that the political parties did not mount a campaign against Proposition 198 with the voters at the time of the election. *See* R.T. at 230; *Nader v. Schaffer*, 417 F.Supp. 837, 850 (D.Conn.1976), aff'd. without opinion, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976) (criticizing plaintiffs for "seeking a change in the law by judicial fiat" rather than by political activity).

[13] For ease of reference, throughout this opinion the terms "plaintiffs" and "defendants" shall include the intervenors, and when the political "parties" are referred to as taking a position in this action, the term shall include the individual officers who are also plaintiffs.

II.

This case presents two competing views as to the function of the direct primary and, to some extent, as to the function of the political parties. From the parties' perspective, the parties are autonomous organizations and the primary is their opportunity to select their leaders and to define their positions on political questions. From the defendants' perspective, the primaries are the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders, and the political parties, as they operate to frame the choice of candidates, are a part of a highly regulated governmental activity – the election process. Both positions find support in the Constitution and the relevant case law. The "freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214, 107 S.Ct. 544, 548, 93 L.Ed.2d 514 (1986). "As a result, political parties' government, structure, and activities enjoy constitutional protection." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357, 117 S.Ct. 1364, 1369, 137 L.Ed.2d 589 (1997). However, the States also have a strong interest in the conduct of elections. "[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian*, 479 U.S. at 217, 107 S.Ct. at 549.

It is the clash of these two constitutionally rooted interests that must be resolved in this case.

The Supreme Court has never directly considered the constitutionality of a blanket or open primary. In *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981), the Court had the opportunity to decide the constitutionality of Wisconsin's open primary but decided the case on a different basis, merely noting that the State Supreme Court had concluded that the "open primary serves [a] compelling state interest" and that "[u]pon this issue, the Wisconsin Supreme Court may well be correct." *Id.* at 121, 101 S.Ct. at 1018.[14] Perhaps the closest case is *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), but in *Tashjian* the Court addressed the reverse of the situation presented here; in *Tashjian* the state election law provided for a closed primary and the political party desired to open its primary to independent voters.[15] Thus, the Court had no occasion to address

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[14] The Court viewed the issue as "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party." 450 U.S. at 121, 101 S.Ct. at 1018. Justice Powell in dissent would have held that the open primary was supported by compelling interests that outweighed the burden on the National Party. *Id.* at 126, 101 S.Ct. at 1020.

Justice Powell's dissent, like Justice Abrahamson's opinion for the Wisconsin Supreme Court, discusses many of the issues relevant to this case.

[15] The Court expressly cautioned that its holding was limited to the particular set of circumstances before it. *Id.* at 224 n. 13, 107 S.Ct. at 554 n. 13 ("Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership."). *Nader v. Schaffer*, 417 F.Supp. 837 (D.Conn.), aff'd. without opinion, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976), also addressed the constitutionality of a closed primary.

either the State's interests in an open or blanket primary or the burdens imposed on a political party by such a primary system. Two State Supreme Courts – the Supreme Courts of Alaska and Washington – have examined the constitutionality of the blanket primary and both have concluded that a blanket primary withstands a party's First Amendment challenge. *See O'Callaghan v. Alaska*, 914 P.2d 1250 (Alaska 1996), cert. denied, 520 U.S. 1209, 117 S.Ct. 1690, 137 L.Ed.2d 818 (1997); *Heavey v. Chapman*, 93 Wash.2d 700, 611 P.2d 1256 (1980); *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936). As noted above, the Supreme Court of Wisconsin came to the same conclusion concerning the Wisconsin open primary in the face of the Democratic Party's claim that by permitting non-party members to vote in its primary, including Republicans and adherents of other parties, the State's open primary violated the Party's associational rights. *See Wisconsin ex rel. La Follette v. Democratic Party*, 93 Wis.2d 473, 287 N.W.2d 519 (1980).

The court held that the State's closed primary was constitutional in the face of a challenge from two voters who wanted to vote in the primary elections without registering with a party. The court concluded that the closed primary was reasonably related to the legitimate goal of protecting the associational rights of party members.

The Supreme Court recently has explained the standard and manner of review that should be applied when a state election law is challenged by a political party on the basis of the First Amendment:

When deciding whether a state election law violated First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less-exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable nondiscriminatory restrictions." No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358, 117 S.Ct. 1364. 1370, 137 L.Ed.2d 589 (1997) (citations omitted). In describing the "flexible" balancing test now used by the Court, the Ninth Circuit has cautioned that even when "strict scrutiny," the highest standard of review, has been invoked, "its invocation in election law cases has not preordained their outcome." *Lightfoot v. Eu*, 964 F.2d 865, 869 (9th Cir.1992). Moreover, the Court does not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons*, 520 U.S. at 363, 117 S.Ct. at 1372.

In evaluating the constitutionality of Proposition 198, the court therefore must first determine the character and magnitude of the burdens imposed by the blanket primary on the associational rights of the political parties. The court then must consider the State's interests and

weigh the strength of those interests against the particular burdens placed on the parties' associational rights. The greater the intrusion on the parties' associational rights, the greater must be the State's interests and the more narrowly tailored must be the Proposition to advance those interests.[16]

It is only by inference that it can be concluded that minor party members also supported Proposition 198. Moreover, and second, even if the polls are accurate, this is not the way in which decisions customarily are made in our democracy. In no other context do we accept the results of polling for the act of voting. Finally, the parties have selected certain procedures for the modification of their rules. These procedures require deliberation and decisionmaking by the parties' respective central committees. Other deliberative bodies have similar procedural rules. Such rules may affect the nature of the debate – indeed, may cause there to be debate – and may affect the outcome of the decision. We would not accept a poll of legislators as the equivalent of a legislative vote. For much the same reason, a poll of voters is not the equivalent of a decision by a party according to the procedural

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[16] Defendants stress an argument that must be addressed at the outset. Defendants argue that because a majority of the members of the Democratic and Republican parties, and presumably of the minor parties, voted for Proposition 198, the membership of the parties have consented to Proposition 198 and therefore there is no issue for the court to resolve. There are three problems with this argument. First, even though the polls appear to be accurate, those polls do not report the votes of minor party members.

rules of the party. The court therefore rejects the argument that the "parties," defined as the electorate, have agreed to Proposition 198 and that this lawsuit is merely an attempt by dissidents to carry on intra-party disputes that they previously lost at the ballot box. For an interesting discussion of "who gets to speak for 'the party'," *see Daniel H. Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex. L.Rev. 1741, 1777 (1993).

III.

The parties' main argument is that a blanket primary permits voters who are not members of a particular party – who may indeed be hostile to that party's electoral interests – to vote in that party's primary and thus to participate in the process by which the party defines its positions on a variety of issues and by which it chooses its standard bearers. In *Tashjian* the Supreme Court recognized the importance of these interests in invalidating a Connecticut statute that forbade the parties from permitting non-members from voting in their primaries:

> [T]he freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' . . . The statute here places limits upon the group of registered voters whom the Party may invite to participate in the basic function' of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Tashjian, 479 U.S. at 215-16, 107 S.Ct. at 548-49 (citations omitted). Accord *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997) ("the New Party, and not someone else, has the right to select the New Party's standard bearer' ").

A.

The parties contend that their interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how Proposition 198 will work in practice, the blanket primary must be unconstitutional on its face. Yet while the interest in determining who will vote in a party's primary is one protected by the First Amendment, and is undoubtedly an important interest, this is not the end of the inquiry. If it were, then open primaries would also be unconstitutional upon any party's objection: an open primary, every bit as much as a blanket primary, permits voters who are not registered in a party to vote in that party's primary. But many of the States have some version of an open primary and to invalidate them all on this theoretical ground would be an extraordinary intrusion into the complex and changing election laws of the States and would remove from the American political system a method for candidate selection that many States consider beneficial and which in the uncertain future could take on new appeal and importance.[17]

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[17] The expert witnesses in this case differ as to how many of the States have open primaries or some feature of an open primary. Part of this dispute depends on how to classify those States that treat a voter's request for a ballot as tantamount to a

Similarly, were the parties' power to determine membership and to select their nominees unfettered, then the States would also lack power to prescribe candidate selection through a primary election or to require that all voters who have met a State's registration requirements be permitted to vote in the parties' primaries notwithstanding any other membership requirement that a party might impose.[18] However, the States have considerable

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declaration of party affiliation. Even if this patent fiction were accepted, close to half of the States permit voters who are not members of a particular party, and who may be independent or, in some States, members of other parties, to vote in that party's primary election. Moreover, as Justice Powell noted, when a voter may register immediately before voting at the primary, "the difference between open and closed primaries loses its practical significance." Democratic Party, 450 U.S. at 132, 101 S.Ct. at 1024 (Powell, J., dissenting).

[18] The most dramatic example of government control of a political party's membership requirements are the White Primary Cases in which the Supreme Court held that the Democratic Party of Texas could not exclude black voters from its primary. *See Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). An interesting example of how a party's desire to limit its membership could conflict with state law is suggested by the testimony of plaintiff Gail Lightfoot, a member of the State Executive Committee of the Libertarian Party: "You become a member of the Libertarian Party by joining, by asking. It's a request to become a member. And you pay dues and sign a pledge [of nonviolence]. In California, because of state law, state law says that all registered voters that take the name Libertarian are members of the party. But we consider pledge-signing individuals who have paid their dues and signed the pledge to be the true members of our party." R.T. at 153-54; *see also* R.T. at 179 (Peace and Freedom Party confers party membership on persons who are "deprived of the right vote by the State of California because of age, citizenship, or prior social behavior").

regulatory authority over the process of candidate selection and may require that the parties select their candidates by a primary election open to registered voters. *See Lightfoot v. Eu*, 964 F.2d 865, 871 (9th Cir.1992) ("political parties' rights to nominate whomever they want, however they want, is not sacred"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (State can prohibit fusion candidacies). The States' authority over the political parties stems in part from the Constitution, Art. I, 4, cl. 1, and in part from the public function that the political parties perform in the candidate nominating and political processes.

Moreover, the analogy on which the parties rely so heavily, the analogy between the political parties and the myriad of private political, charitable, recreational, educational or religious associations at the center of American life, is imperfect at best. The political scientists who testified in this case agree that a political party cannot be described simply as a private club or association; instead, a political party has three distinct aspects – the party in the electorate, the party organization, and the party in government.[19] Unlike other private associations, at least

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[19] See Pls.' Ex. 6, Cain Report, at 15 ("Since the seminal work of the scholar V.O. Key, parties are thought to consist of three components: the party in government, the party in the constituency and the party as organization."); *Lowenstein, supra*, 71 Tex. L.Rev. at 1760 (1993) ("Although there have been a great many typologies of the varying 'locations' and functions of parties, probably the most common identifies three: the party in the electorate, the party organization, and the party in or running for public office . . . The very fact that references to 'the Democrats' and 'the Republicans' are more common in ordinary conversation than references to the Democratic party' and 'the

in one of their avatars – the party in government – the political parties are very like the government itself. *See Lowenstein, supra,* at 1757 ("unlike any other private groups, political parties routinely, pervasively, and legitimately exercise their influence from within the government"). And the parties perform functions that are fairly characterized as governmental in nature, such as the nomination of candidates.

Furthermore, at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations. The major political parties in this country " 'have been characterized by a fluidity and overlap of philosophy and membership.' It can hardly be denied that [the parties] generally [have] been composed of various elements reflecting most of the American political spectrum." *Democratic Party,* 450 U.S. at 133, 101 S.Ct. at 1024 (Powell, J., dissenting) (citations omitted).

And, as discussed above, the term "party member" as applied to registered voters is something of a misnomer. The States determine who will vote at primary elections – registered voters. *See Cal. Elections Code* §§ 2151, 7164, 7362, 7804, 8001. These voters have not allied themselves to a political party in the customary way that one normally becomes a member of a private association; they have not paid dues, taken an oath, expressed agreement with certain ideals or goals, attended meetings, accepted any obligations, or attended

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Republican party' testifies to the loose and manifold nature of our concept of 'party.' ").

upon any other rite of initiation. The parties do not and could not insist upon more than mere registration as the price of voting in the primary elections.[20] Thus, to contend that Proposition 198 permits non-party members to vote in a party's primary, while accurate, covers over much of the imprecision in the political reality.

In short, it is necessary to look beyond the parties' claim that their constitutional interest in limiting candidate selection to their respective members necessarily prevails over any State interest and without regard to how the voters may behave under a blanket primary.

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[20] "[T]he essence of the legal definitions of party membership in the United States will surely continue to be self-designation. The fact remains that today even in Illinois, New York, or any other closed-primary state you are a Democrat if you say you are; no one can effectively say you are not; and you can become a Republican any time the spirit moves you simply by saying that you have become one. You accept no obligations by such a declaration; you receive only a privilege, the privilege of taking an equal part in the making of the party's most important decision, the nomination of its candidates for public office. The only remaining restriction is that in some states, such as California, you may have to let the registrar of voters know that you have changed parties, and you may have to do so several weeks or even months before your new party's next primary. But in many closed-primary states you do not even have to do that, and in Wisconsin and the other open-primary states you are not allowed to make an official declaration of your party membership. One can only conclude that the so-called 'closed' primaries are just a hair more closed than the so-called 'open' primaries." A. Ranney, Curing the Mischiefs of Faction 166-67 (1975), quoted in Wisconsin ex rel. *LaFollette v. Democratic Party,* 93 Wis.2d 473, 287 N.W.2d 519, 535 (1980).

B.

Turning to the more practical implications of a blanket primary, the parties contend that a blanket primary process in California will have a destructive effect on all political parties both major and minor. The parties predict that there will be widespread cross-over voting, whether benevolent or malicious, and that the consequences of this large cross-over vote will be many and adverse to the parties. The parties contend that the cross-over vote, and the prospect of a large cross-over vote, will affect the selection and behavior of party nominees and elected officials; weaken party discipline; increase the costs of primary elections by causing candidates to compete as if it were a general election; dampen the morale of party activists; and disrupt internal party structure and governance. Much of the testimony at trial was directed to the question of whether voters in blanket primary states tend to cross over in sufficient numbers to influence the outcome of elections and whether they cross over for benevolent or malevolent reasons. A cross-over voter is one who votes for a candidate of a party in which the voter is not registered. Thus, the cross-over voter could be an independent voter or one who is registered to a competing political party.[21] A cross-over voter may be actuated by three different purposes. First, the voter's purpose may be to vote for the voter's most preferred choice to win in the general election; this kind of cross-over voter is sometimes referred to as engaging in "sincere" voting. Second, the voter may be engaged in "strategic" voting,

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[21] Some of the experts exclude independents from their definition of cross-over voters.

designed to obtain the best possible outcome, by voting for the voter's second choice in a setting where the voter's first choice, within the voter's own party, either has no apparent chance of victory at the general election or is so certain to win the party's nomination that the voter perceives that his or her vote is best spent influencing another party's primary and thus the choice at the general election. Finally, the voter may be a raider, crossing over to vote for a candidate who is perceived as the "weakest" of an opposing party's candidates in the hopes that this candidate will win the primary only to be trounced at the general election.[22]

The parties contend that a blanket primary will unleash a torrent of cross-over voting even by comparison to open primaries. The parties reason that unlike an open primary, a blanket primary permits a voter to cross over as to particular contested elections without losing the ability to vote in the remainder of the contests in the voter's own party. The evidence at trial suggests that the parties are correct that cross-over voting will be more prevalent after Proposition 198. Indeed, defendants can hardly dispute this point while maintaining that the State's interests are furthered by a blanket primary precisely because it facilitates cross-over voting. Nonetheless, the parties' characterization of the likely amount or effects of cross-over voting due to a blanket primary is overdrawn.

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[22] A sophisticated raider will vote for the weakest among those candidates who have a realistic chance of prevailing at the primary.

To begin with, there is little evidence that raiding will be a factor under the blanket primary. On this point there is almost unanimity among the political scientists who were called as experts by the plaintiffs and defendants. Professor Costantini, for plaintiffs, gave his opinion that [s]urvey evidence tends not to support any fear that raiding (sometimes characterized as "mischievous voting") will be a common phenomenon under Proposition 198. At least in open presidential primaries (the focus of almost all the relevant studies), it appears that the great majority of crossover voters – from 90% to 95% or more – invade a party's primary to vote for a preferred candidate and not to vote for a candidate who they will oppose in the general election and who they believe will be easier to defeat in that election. Pls.' Ex. 7, Costantini Report, at 7; R.T. at 485-86. Professor Donald Olson of the University of Washington-Seattle, reflecting on the over half century of experience with a blanket primary in Washington, explained that the conditions for successful raiding rarely exist:

> The potential for raiding under the blanket primary generates wide media attention and spawns electioneering lore that is simply unwarranted by actual experience. Technically defined, raiding would occur where partisan voters of party X cross-over in sufficient numbers to help select the weakest or most vulnerable candidate in party Y. The requirements for this form of electoral subterfuge are: (1) the absence of a meaningful primary contest in party X; (2) provision of sufficient information to identify the weaker and most vulnerable potential opponent in party Y; (3) concerted action by a large enough bloc of voters in party X to influence the outcome in the primary of party Y; and (4) the abandonment of traditional party loyalties by partisan voters to enter the opponent's primary. In the experience of Washington state, these requirements are simply too demanding and have not been fulfilled in actual practice. Defs.' Ex. G, Olson Report, at 6. *See* Pls.' Ex. 6, Cain Report, at 6-7; R.T. at 355.

Given that the purpose of raiding is to weaken a competitive party's advantage at the general election, raiding is not a concern for minor parties because their candidates rarely have a chance of prevailing at the general election. Indeed, no conclusive instance of raiding in such numbers as to affect the outcome of any primary was offered by plaintiffs.[23]

As to benevolent cross-over voting, the evidence suggests that there will be particular elections in which there will be a substantial amount of cross-over voting – perhaps as high as 25% of the vote for that office – although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states. There will be a small number of elections in which the cross-over vote proves decisive, and there will be other elections in which the possible importance of the cross-over

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[23] Professor Cain suggests that the 1974 Alaska Gubernatorial Republican primary may be an example of raiding in which Democrats and Independents "raided" to support liberal Republican Jay Hammond over former Governor Walter Hickel. However, as Professor Cain notes, the cross-over voters may have been "liberal shoppers" as opposed to saboteurs. *See* Pls.' Ex. 6, Cain Report, at 7.

vote will be an influence on the conduct of the primary campaign and the conduct of elected officials.

The experience in Washington suggests that as to the election for any particular office, approximately 10% of the voters are cross-over voters, excluding independents, while in some exceptional cases this figure may rise as high as 20-25%. R.T. at 511.[24]

Typically the cross-over vote in Washington does not change the result of an election but only the margin of victory. R.T. at 513. Moreover, the amount of cross-over voting is greater in a blanket primary than an open primary but not dramatically so. According to Professor Nagler, who co-authored the most comprehensive study of patterns of cross-over voting presented at the trial, the average cross-over rate, excluding independents, is something on the order of 5% of voters in closed primary states,[25] 10% of voters in open primary states, and 11-15% in blanket primary states. R.T. at 780, 788; Defs.' Ex. H, Alvarez and Nagler Report, at 11-12. The study concludes that "crossover voting in blanket primaries is not dramatically higher than in other types of open primary systems" and that "there is very little crossover voting in

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[24] According to Professor Olson, approximately 25-33% of voters vote for candidates of only one party throughout the ballot, voting a straight ticket. The remainder of the voters cross over at least once.

[25] In a closed primary state, a cross-over voter is one who identifies with one party but decides to register in another party for the purpose of voting in the primary of that other party.

general in primary elections in the United States." *Id.* at 35-36.[26]

Although cross-over voting typically does not change the outcome of a primary and may not be much greater in a blanket than in an open primary, it is probable over time that there will be some elections under Proposition 198 that will be decided by the cross-over vote. Cross-over voting is most likely to occur when one party's primary is competitive while the other party's primary is not. When this condition of "asymmetric competition" occurs, voters of the party with the noncompetitive primary may cross over to the other primary to influence the choice. The incentive to cross over will be particularly high if the winner of the other party's primary is almost certain to win at the general election. *See* Pls.' Ex. 6, Cain Report, at 8. Every two years in California there are 80

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[26] Plaintiffs fail to present substantial or convincing evidence that the minor political parties will be affected by cross-over voting to any significant degree. A strategic voter would not cross-over to vote in a minor party's primary because the victor of the minor party primary will not likely be the winner in the general election. Moreover, the minor parties rarely have contested primaries. R.T. at 167, 618, 630-31. Finally, the minor parties make much of their small turn-out at the primary election compared to the much larger numbers of voters who select their candidates at the general election. From this disparity, the minor parties argue that they will be swamped at the primary election by the same nonparty members who vote for their candidates at the general election. This conclusion does not follow. Those non-party members who vote for minor party candidates at the general election are most likely voters whose preferred candidates were not selected in the primary of a major party. R.T. at 193.

Assembly races, 20 State Senate races, and 52 Congressional races. Examining the 1996 Assembly primaries, Professor Cain identified ten races in which there were asymmetric competitive conditions. In some of these races, a cross-over rate of 5% could have changed the outcome of the election had all of the cross-over voters voted for the same candidate. Given that in Washington, cross-over rates occasionally reach levels as high as 20-25%, and that the cross-over rate in California could be higher than Washington,[27] it is likely that in the fullness of time some California primary races will be decided by cross-over voters, even if the number of such occasions is not large. Depending on the circumstances, the swing of even one seat could give a legislative majority to one party.

Furthermore, the possibility of a decisive cross-over vote – whether or not that vote materializes – could well affect the conduct of elections and elected officials. Under a blanket or open primary, the primary election becomes similar to the general election. Candidates will perceive a need or opportunity to attract support from the entire electorate, not simply from members of their respective parties. This will affect not only the cost of the primary – which is likely to increase, *see* R.T. at 270 – but may affect the positions that candidates take on political issues as they seek to attract cross-over voters. Moreover, once elected, candidates may perceive that the cross-over vote makes them less vulnerable at the primary to the wrath of

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[27] *See* R.T. at 574. Whether cross-over rates in California will be similar to those in the other blanket primary states is necessarily a matter of conjecture.

the party organization or party regulars for acts of apostasy. A blanket or open primary weakens the "disciplining effect" of the primary challenge in requiring "the officeholder [to] carry out the party philosophy and support the majority position of the party caucus." R.T. at 214. The corollary to this loss of discipline is a loss of power to party activists such that the ardor of party volunteers and activists may be dampened in a system that permits nonparty members to exert influence over the party's selection of a candidate. This has been the experience in Washington and is likely to occur in California. *See* R.T. at 558; R.T. at 18; R.T. at 989-990.

Finally, the parties argue that their internal governance will be disrupted by the blanket primary and the cross-over vote. Although Proposition 198 specifically exempts party committee positions from the blanket primary, both the Republican and Democratic Parties permit officeholders and nominees to appoint members of their governing bodies, the Democratic State Central Committee and the Republican State Central Committee. Because nominees may have been selected by non-party members, and because the nominees in turn choose members of the Central Committees, the parties contend that their governing body may be adulterated.

Further, the parties warn that their respective national organizations may not accept the results of the California presidential primary, if that primary is a blanket primary, with the result that the parties may be forced to hold a nominating convention or caucus. Neither of these contentions is particularly forceful, however. As to membership on the Central Committee, the parties are

free to change their selection process if they wish. Moreover, both parties already give more positions on the Central Committee to successful candidates; yet these successful candidates are precisely those who have appealed more broadly across party lines. R.T. at 9, 224. As to the national nominating conventions, the California parties may be forced to adopt a different procedure for delegate selection other than the presidential primary or they may receive a waiver from their national organizations such as Wisconsin eventually received from the Democratic Party. R.T. at 123, 145. This is a choice for the parties to make, and they can do so as they please without interference from the State.

C.

The magnitude of the burdens imposed on the parties by Proposition 198 are not fairly characterized either as "severe" or as "negligible," the two labels most often applied in the caselaw at this juncture of the analysis. The burdens are not negligible. State law requires each party to select its candidate through a primary, and the winner of the primary will be the party's nominee.

The blanket primary wrests a measure of control of the primary process from the party and its members. This is its purpose. The party may still endorse a candidate and may throw financial support to a particular candidate. And, in the typical election, the cross-over vote will not be decisive. Yet by permitting non-party members to vote in a party's primary – even granting the uncertainty of the label "party member" – Proposition 198 is an intrusion on a party's traditional right to select its own

candidate. In this respect, the blanket primary is no different from an open primary although the practical effect of a blanket primary on the selection process may be somewhat greater than an open primary. In addition, a blanket primary, like an open primary, may depress the vigor and morale of party activists and may affect the ability of the party to discipline errant legislators.

On the other hand, the burdens on the parties due to Proposition 198 are not likely to prove severe or debilitating. The Washington experience, as well as that of the many open primary states, suggests that Proposition 198 will not diminish the efficacy or strength of the political parties in California by any substantial degree.[28] Indeed, a study of the political parties in the 1970's and 1980's in 13 western states, including Washington and California, concluded that the political parties in Washington were the most competitive with one another of all 13 states. R.T. at 524; *see Tashjian*, 479 U.S. at 223 n. 12, 107 S.Ct. at 553 n. 12 ("dire" predictions as to decay of parties not borne out by the 29 States that have open primary features). Both the Democratic and Republican Parties continue to be strong political parties in Washington, and can be expected to operate with little diminution in their effectiveness in California.[29] The parties do not show that

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[28] Professor Cain would not expect a blanket primary to be so debilitating to the parties that it should be removed as an option altogether even if the parties were in favor of it. R.T. at 457. Professor Cain's greatest concern is to protect party autonomy.

[29] According to Professor Olson the Washington Republican Party has been ranked as among the strongest Republican parties in the nation. Professor Olson states that the

the blanket primary is significantly different theoretically or practically from the open primary. Nor do they show or even contend that Proposition 198 has any discriminatory purpose or effect. Thus, the burden imposed by a blanket primary falls evenly on all of the parties whatever their size or ideology. Finally, Proposition 198 leaves untouched the wide field of party endeavor that is not directed specifically to the primary, activities such as developing the party platform, registering new voters, and getting out the vote on election day. Defs.' Ex. I, Quinn Report at 18.

In light of all of these considerations, the court finds that the parties have succeeded in showing that the blanket primary imposes a significant but not severe burden on their associational rights. To survive the challenge mounted by plaintiffs, Proposition 198 must be supported by interests that are sufficient to outweigh the burdens identified above. Those interests need not be compelling, given that the burdens are not crushing, but they must be important.

Washington Republican Party "is alive, it is healthy, it is well, it is vigorous. It is the single most important institution for recruiting candidates to run for office. It's the single most important institution for endorsing candidates. It is the most important fundraising institution in the conduct of elections." R.T. at 527. According to Professor Olson although the Washington Democratic Party is not so dynamic as its competitor, it is still of above average organizational strength as compared to the Democratic parties of the 50 states. R.T. at 528.

IV.

The States have broad regulatory authority over the conduct of elections including primaries.[30] The primary election is the critical first stage in the electoral process: "The direct primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers." *Storer v. Brown*, 415 U.S. 724, 735, 94 S.Ct. 1274, 1281, 39 L.Ed.2d 714 (1974). "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the political parties] have been made." *Morse v. Republican Party*, 517 U.S. 186, 205-06, 116 S.Ct. 1186, 1199, 134 L.Ed.2d 347 (1996) (citation omitted).

Proposition 198 is the latest development in a history of political reform measures that began in the Progressive Era. "The Progressives believed democracy should be something greater than competition between political parties." *Lightfoot v. Eu*, 964 F.2d at 872. The Progressives sought to diminish the importance of the parties and

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[30] "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 729-30, 94 S.Ct. 1274, 1278-79, 39 L.Ed.2d 714 (1974).

"party bosses" by establishing nonpartisan local elections, a comprehensive civil service system, direct legislation through the initiative and referendum, and the cross-filing system by which members of one party could run in the primary of the other party. *See* Defs.' Ex. I, Quinn Report, at 7 (quoting J. Owens and E. Costantini, California Politics and Parties (1970)).[31] The cross-filing system is of particular note because in practice it bore some resemblance to a blanket or nonpartisan primary system.[32]

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[31] Lowenstein contrasts the Progressives' "vision of a democracy purged of corruption by placing widely dispersed power in the hands of common men and women" with the views of "party renewal advocates" who believe in autonomous, strong, cohesive political parties who engage in "responsible party government" much on the European parliamentary model. *See Lowenstein, supra,* 71 Tex. L.Rev. at 1761-71, 1791. The debate in this case has been framed by the experts in similar terms.

[32] Under the cross-filing system, "[a] candidate registered in one party may seek the nomination of all parties at the primary. If he fails to secure the nomination of his own party, he cannot be the candidate of any party at the general election." *Jones v. McCollister,* 159 Cal.App.2d 708, 324 P.2d 639 (1958). Under the cross-filing system voters registered to different parties had the opportunity to vote for the same candidates. According to Dr. Quinn, as the system worked in California, the winner of one party's primary tended to be the winner of the other party's primary as well:

> The cross filing system existed in California from 1911 to 1959. Under this system, a legislator or member of congress could file to run in both the Democratic and Republican primaries, and so long as he or she won their own party nomination, they would win the nomination of the other party as well. . . . On the general election ballot, the winners, usually

Defendants advance a number of State interests furthered by Proposition 198. All of the various interests, however, reduce to one fundamental contention: according to defendants, Proposition 198, like other Progressive Era reforms, enhances the democratic nature of the election process and the representativeness of elected officials.

Defendants stress that a blanket primary opens up the candidate selection process to two types of arguably "disenfranchised" voters – independents and minority party voters in safe districts. In a blanket primary, independent voters will be able to participate in framing the choice that they will ultimately have to make in the general election. Approximately 11% of the electorate in California are registered as independents, and the proportion of independent voters is growing rapidly. R.T. at 940. Moreover, many California voters reside in "safe districts," districts in which one party is dominant.[33] Voters in these districts who belong to the minority party have no influence or voice because the general election is decided as a practical matter in the primary of the dominant party. Of 15.6 million registered voters in California, approximately one quarter are "disenfranchised" in this

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> incumbents, are shown as the nominees of both parties. Defs.' Ex. I, Quinn Report, at 7.

[33] According to Dr. Quinn, "A district could be considered safe if it had not been contested between the parties since it was created in the 1991 reapportionment; the area covered had been historically one party in its voting . . . ; there was no significant money spent in the election between the two parties in '94 and '96 . . . ; and if the incumbent received more than 55 percent of all of the votes cast in the election." R.T. at 847-48.

way. R.T. at 854. Defendants suggest that the inability of these voters to influence the outcome of the election in their districts leads to the election of representatives who see no need to represent these voters or to pay heed to their interests. Of course, such voters could register in the majority party, but this would require them to give up their current party or independent registration.

Apart from the exclusion of independents and minority voters in safe districts, defendants contend that the closed primary gives undue power to party members and loyalists, including incumbent elected officials, such that the voters in the general election are presented with candidates who are more partisan and who take positions on the policy issues of the day that are not representative of the majority of the electorate. *See* R.T. at 243, 269, 299, 857. Defendants note that turnout is low at primary elections, and thus that a minority of more partisan party members, influenced by the endorsements of party leaders, determine the choice for the much larger group of all voters at the coming general election. Defendants suggest that this skewing of the process toward partisan candidates leads to legislative impasse and thus alienation of the electorate from the political system. Defendants contend that candidates who would command majorities at the general election are unable to prevail at the primary such that the voters at the general election are forced to pick among candidates none of whom is the first choice of the majority of voters. R.T. at 255-256. Although these assertions are not readily susceptible of

proof, many are not contested,[34] or are supported by persuasive opinion evidence from defendants' experts. See, e.g., R.T. at 954-963, 974-975. Furthermore, these contentions are clearly stated in the ballot pamphlet, and it is a fair inference from the margin of support that the people of California agree that a blanket primary system will lead to the election of more representative "problem-solvers" who are less beholden to party officials and "special interest groups." While political scientists may disagree on the question of whether the political system is benefitted when parties are more or less distinct or polarized, it is apparent that the voters have sided with less partisanship in adopting Proposition 198.[35]

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[34] There is some evidence that elected officials from blanket primary states are closer to the views of the electorate as a whole than officials from closed primary states. *See* Defs.' Ex. E, Gerber Report, at 11. Some of plaintiffs' experts apparently would agree that candidates selected in a blanket primary are likely to take less partisan or extreme positions than those selected in a closed primary. They do not concede that this is healthy, however, because they believe that the system is benefitted by greater partisanship and greater distance between the parties.

[35] There is some suggestion in defendants' brief that the blanket primary will also make the parties more representative and therefore will benefit and strengthen the political parties. Defs.' Post-Trial Brief at 45. The Supreme Court has given little weight, however, to State interests couched in terms of what is good for the parties. The Court has found that it is for the parties to decide what is in their interest. *See Tashjian*, 479 U.S. at 222-24, 107 S.Ct. at 552-53; *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 227-28, 109 S.Ct. 1013, 1022-23, 103 L.Ed.2d 271 (1989).

Defendants also argue that representativeness and democratic participation are benefitted by the higher voter participation expected in a blanket primary election. Voter participation in primary and general elections in California has declined markedly over the past two decades. R.T. at 658. Turnout rates in blanket primary states have been higher than in California, and there is reason to expect that by providing more choice, the blanket primary may encourage more voters to participate at the primary election. Similarly, defendants contend that elections will be more competitive under the blanket primary, again leading to an increase in voter interest and participation. Although the empirical case for the assertion that blanket primaries are more competitive than other primaries is not conclusive, there is reason to expect some increase in the number of candidates, the closeness of elections, and, therefore, voter turnout.

Finally, defendants point to one interest – voter privacy – that does not fit neatly under the representativeness or participation headings, although it is possible that greater privacy could lead to greater participation. Defendants note that a blanket primary protects voter privacy by permitting voters to participate in the primary election without publicly declaring a party affiliation as is the case in closed primary states and in some open primary states.

V.

Taken as a whole the State's interests that support the blanket primary are substantial, indeed compelling.

There is a "substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community." *Storer v. Brown*, 415 U.S. 724, 729, 94 S.Ct. 1274, 1278, 39 L.Ed.2d 714 (1974). In attempting to reduce partisan strife, Proposition 198 is similar to other measures adopted by the States to deal with the problem of factionalism, a problem that deeply troubled the framers of the Constitution. See The Federalist No. 10 (Madison). A State's interest in ameliorating "unrestrained factionalism" is a compelling one. Increasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in the primary process are all interests of the first order. *See Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir.1992) (State's interest in a direct primary is compelling). The voters' belief in the fairness of the electoral process is also a substantial state interest; it is apparent that the voters of California believe that the system is fairer when all voters, including independents and regardless of party affiliation, may participate in framing the choice of candidates at the general election. And while the parties argue that there are other ways to increase voter turnout, the fundamental goal of enhancing representativeness by providing all voters with a choice that is not predetermined by party members alone can only be advanced by the blanket primary. Unlike Tashjian in which the Democratic Party controlled the legislature and attempted to tell the Republican party who could vote in its primary, and where the State's purported interest in a closed primary was to protect the parties from disruption from without, Proposition 198 is a non-discriminatory measure that was adopted by a clear

majority of voters, with a convincing margin from both major parties, and which advances interests that are uniquely those of the State and its electorate as opposed to the parties. These interests outweigh the also substantial interest that the political parties have in controlling who votes in the primary.

In reaching this conclusion, the court does not decide whether a blanket primary is a good idea; it may prove to be a bad idea, in which case the people of the State presumably will act to reform the system in the future as they have in the past. Nor does the court decide whether the voters were correct in concluding that a more representative and participatory system is desirable at this time in the State's history or whether it is wise to weaken the parties by some degree to further the goals of representativeness and participation. These important questions are for the people of the State to decide.

Each of the States has its own experiment in democratic government. The history of election law is one of change and adaptation as the States have responded to the play of different political forces and circumstances. There is little reason to expect that the future will be any different. The court concludes that a blanket primary serves sufficiently weighty interests that the State of California should not be precluded from ever trying such a procedure.

Judgment is awarded to defendants.

IT IS SO ORDERED.

MOTION FILED
NOV. 1 1999

(3)

No. 99-401

In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA AND PEACE AND FREEDOM PARTY, ET AL.,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA AND CALIFORNIANS FOR AN OPEN PRIMARY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Republican Party of Alaska, Inc.; the Libertarian Party of Alaska; the Alaskan Independence Party; Wayne Anthony Ross; Mark Chryson and Linda S. McKay move for leave to file the attached brief amicus curiae requesting that the pending petition for certiorari be granted by this Court. The counsel for petitioners and for respondent Bill Jones, Secretary of State of California, have consented to the filing of this brief amicus curiae. The consent of the remaining respondents has been requested, but has not been obtained.

The interest of the proposed amici in this case is that they are presently litigating identical issues. They are all parties in *Ross v. State of Alaska*, ___ F.3d ___, 1999 WL 680345 (Ninth Circuit Docket No. 98-35720, decided September 2, 1999). In addition, the Republican Party of Alaska was an intervenor-defendant in *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), cert. den., *Republican Party of Alaska, Inc. v. State*, 520 U.S. 1209 (1996). *Ross v. State*, *O'Callaghan v. State*, and this petition involve the question of whether it is a violation of the First Amendment right of free political association for a state to require that political parties and their members must participate in a primary election in which registered members of any political party may freely participate in choosing the nominees of other political parties, as a condition of those nominees being placed on the general election ballot. The petitioners in this proceeding characterize the question as whether California's new blanket primary law – which allows voters of any political affiliation to cross party lines at will and to participate in the

selection of other parties' nominees – violates the First and Fourteenth Amendments to the United States Constitution. This is the same question, stated a bit differently. Any decision by this Court in this case will necessarily affect the rights and position of the amici, parties in *Ross v. State*.

The proposed amici are presently preparing their own petition for certiorari from the September 2, 1999, decision of the Court of Appeals for the Ninth Circuit in *Ross v. State*. This separate petition will be filed with this Court approximately November 10, 1999.

The purpose of this amicus brief is to advise the Court that this case is crucial to the political parties in Alaska, has an importance beyond its importance to the parties to this case, and that the issues presented by this case are ripe for review and should be reviewed at this time.

The acceptance by the Court of this amicus brief will provide it with additional important information as to why it is crucial that the petition for certiorari in this case be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE[1]

The First Amendment rights of the political parties are crucial to their very purpose and existence. One of the basic aspects of these rights is that political parties have the right to select their own candidates, with minimal interference from the states. Courts in both California and Alaska have nullified this right, however, by approving blanket primary elections. The political parties, and affected individuals, from both California and Alaska are now before this Court at the same time, seeking protection of their First Amendment right of free political association.

The situation in Alaska is different from the situation in California. For example, without limitation, (1) the blanket primary is new in California, but has a long history of problems in Alaska, (2) the blanket primary was adopted by the initiative in California and by the Legislature in Alaska, and (3) Alaska statutes dealing with the self-selection of candidates and party registration harm the Alaska political parties to a greater degree than the California statutes harm the California political parties. The proposed amici will present to this Court a position from a different perspective than the position which is presented by the California petitioners.

The petition for certiorari should be granted by this Court in this case. Also, certiorari should be granted in

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Ross v. State of Alaska, ___ F.3d ___, 1999 WL 680345 (Ninth Circuit Docket No. 98-35720, decided September 2, 1999) in which the petition will be filed shortly. The issues involved in these cases are crucial to the political processes in both Alaska and California, are important for the future development of the election processes in other states, and are ripe for review at this time.

THE ISSUES INVOLVED ARE RIPE FOR REVIEW AT THIS TIME

The Republican Party of Alaska (RPA) has objected to the blanket primary election in Alaska since 1990. In *Doyle v. State*, F90-33 CV (D. Alaska 1990), the District Court refused to order that the 1990 Alaska Republican primary election be conducted in accord with the RPA rule, and a blanket primary was used in 1990. In *Zawacki v. State*, A92-414 (D. Alaska 1992), the District Court announced a tentative decision that, under *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Alaska blanket primary statute impermissibly infringed on the RPA's right to free political association. As a result, the 1992 and 1994 Republican primary elections were conducted in accord with the RPA rule, contrary to Alaska statute. In *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), the Supreme Court of Alaska held that the Alaska blanket primary statute did not impermissibly infringe on the RPA's right to free political association – a decision directly opposite to the decision of the U.S.

District Court in *Zawacki*.[2] As a result, the 1996 and 1998 Republican primary elections were conducted in accord with the Alaska statute, contrary to RPA rule.

In 1995, prior to participating in any way in *O'Callaghan v. State*, the RPA filed *Ross v. State*, A95-053 CI (HRH) (D. Alaska, 1998) in the U.S. District Court for Alaska, seeking a declaratory judgment and injunction requiring that the 1996 and future Republican primary elections be conducted in accord with the RPA rules. In 1997, the Libertarian Party of Alaska, the Alaskan Independence Party (AIP), and additional individuals joined *Ross v. State*, A95-053 CI (HRH) (D. Alaska, 1998). The Alaska blanket primary election was also contrary to the rules of these parties. The relief sought by all plaintiffs was a declaratory judgment that the parties, rather than the State of Alaska, had the right to determine the manner of selection of the party candidates to represent the parties in the general election, and an injunction requiring that future Alaska primary elections be conducted in accord with the party rules. *Ross v. State* was dismissed by the District Court on res judicata and lack of case or controversy grounds. This dismissal was affirmed by the Court of Appeals for the Ninth Circuit in *Ross v. State*, ___ ___ F.3d ___, 1999 WL 680345 (9th Cir. 1999).

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[2] Justice Jay A. Rabinowitz, in a correct and well-reasoned dissent, would have placed the burden of proof on the State of Alaska to demonstrate compelling reasons for limiting the associational rights of the RPA. (914 P.2d 1264) The Court majority placed the burden of proof on the RPA to show a substantial burden to its associational rights, but refused the RPA any opportunity to make a factual record before the trial court. (914 P.2d 1250, fn. 16)

The RPA filed a petition for writ of certiorari from the decision of the Supreme Court of Alaska in *O'Callaghan v. State* on June 3, 1996, as *Republican Party of Alaska v. O'Callaghan*, Supreme Court Docket No. 95-1962. This petition for certiorari was denied on May 12, 1997, almost a year later. Under the practice of this Court, a petition for certiorari is ordinarily acted upon approximately six weeks after it has been filed, or about two or three weeks after the brief in opposition has been filed. Stern, Gressman, Shapiro and Geller, *Supreme Court Practice, Seventh Edition*, Section 5.2 at page 224 (1993). The *O'Callaghan* petition apparently had sufficient merit that this Court held it until almost the end of the term before ruling.

A petition for certiorari may be denied for various reasons, within the sound judicial discretion of this Court. The denial of the petition for certiorari in *O'Callaghan* appears to be a classic example of the judicial policy discussed by Justice Frankfurter in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950), as follows:

> It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

In its *O'Callaghan* petition for certiorari, the RPA informed this Court of three examples of pending and future litigation involving the same issues, as follows:

(1) *Virginia – Marshall v. Meadows*, 3:96CV208 (E.D. Va. 1996), pending at the time, involved a claim that Section 24.2-530 of the Code of Virginia was unconstitutional as an unlawful infringement on the right to associate freely with other citizens for the advancement of

shared political objectives, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. The complaint alleged that the law of Virginia required the Republican Party of Virginia to open its primary nomination process to individuals who do not meet the party's qualification for participation in the selection of the party's candidates.

(2) *California* – In 1996, the voters of California adopted a blanket primary election. At that time, subsequent litigation by the California political parties was virtually certain. This subsequent litigation took place, and has resulted in this petition for certiorari presently before this Court.

(3) *Alaska – Ross v. State*, A95-053 CI (HRH) (D. Alaska, 1998) the action filed by the RPA to obtain a federal determination of its First Amendment associational rights, was pending at the time. The Libertarian Party of Alaska and the Alaskan Independence Party subsequently joined this action. This action resulted in *Ross v. State*, ___ F.3d ___, 1999 WL 680345 (9th Cir. 1999). A petition for certiorari from this decision will be filed with this Court in the near future.[3]

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[3] The RPA also advised this Court that it intended to conduct a private mail-in primary election in 1996 to select its candidates for the general election. The RPA was not able to protect its rights in this way, however. Various factors, including existing laws, need for U.S. Department of Justice preclearance, time available, and costs, made it impossible for the RPA to implement this alternative.

In 1996, there was clearly going to be a substantial judicial record developed on the issues presently before this Court, and the case was not ripe for consideration. Now, this record has been developed. The Virginia case is now completed. There was no ruling on the merits. The case was dismissed for lack of standing, which dismissal was affirmed in *Marshall v. Meadows*, 105 F.3d 904, 906-907 (4th Cir. 1997). The parties in the California litigation are before this Court. The parties in the Alaska litigation will be before this Court directly. The issues are now ripe for resolution.

THE ISSUES INVOLVED ARE CRUCIAL TO ALASKA, CALIFORNIA AND NATIONALLY

Alaska

Voters form political parties in order to advance their political beliefs. The major method for the parties to do this is to select candidates who represent the beliefs and philosophies of the members, and secure the election of these candidates to public office. The First Amendment to the Constitution of the United States guarantees the people the right to advance their political beliefs in this manner. The law of Alaska severely and impermissibly infringes on the right of the people and political parties to do this.

The Alaska law applicable to the rights and abilities of Alaskan political parties to select their candidates to represent their interests can be summarized as follows:

(1) The parties have no control over who will run as party candidates in their own primary elections. These

candidates designate themselves as the party standard-bearers. (AS 15.25.030) A candidate may even change party registration on the same day as filing a declaration of candidacy.[4] The parties must allow these self-designated candidates to run under the party name, and cannot get rid of them even if they are totally unacceptable to the party.

(2) The parties have no control over who may vote in their primary elections. (*O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), AS 15.25.040. In the past, candidates representing political parties in the general elections have been selected by voters of opposing parties through cross-over voting.

(3) The parties cannot even protect the use of their own party names to avoid confusion and misrepresentation. (*Republican Party of Alaska v. Metcalfe*, Case No. 3AN-86-11714 (Sup.Ct., 3rd Jud. Dist., Alaska, 1986)) As a result, both the real Republican Party and a "Republican Moderate" party (supported in part by the Democrats), are now both ballot-qualified. Candidates of the Republican Moderate Party will appear for the first time on the 2000 Alaska primary and general election ballots in opposition to candidates of the real Republican Party.

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[4] In fact, some years ago, Alaska had a candidate running for state office as a candidate of one of the major political parties. This candidate changed his party registration to that of the other major party ten minutes prior to the filing deadline, so that he could run for office as a member of the party that he secretly wanted to represent and so that he would have no opponent from the other party. Although extreme, this is typical of the mischief that is sometimes performed under the Alaska method of candidate selection.

The fact that the parties have no control over who may vote in their primary elections has been the subject of a decade of litigation in Alaska, and the litigation is continuing. Since the claims of the AIP and the Libertarian Party of Alaska in *Ross v. State* were dismissed for lack of case or controversy, they will be filing new litigation in the Alaska District Court to determine their rights for the 2000 primary and general elections. The RPA has lost a trial court action seeking to protect its exclusive use of the "Republican" designation. No Alaskan parties have specifically litigated the issue of self-selection of candidates. If the parties have no right to determine who their voters are going to be, then they will have to litigate the question of whether they have the right to select their candidates. Both of these issues are directly related. A decision by this Court dealing with the right of free political association as it applies to party selection of primary election voters is needed to control future litigation on that subject, and guide the parties in determining how to deal with the issue of candidate selection.

In its petition for certiorari in *Republican Party of Alaska v. O'Callaghan*, Supreme Court Docket No. 95-1962, the RPA cited several examples of how cross-over voting, allowed by the Alaska statutes, harmed the political parties in their right to choose their own candidates. These examples need not be repeated here. The problems did not exist during the 1992 and 1994 elections, which were conducted according to RPA rule. The 1996 elections were uneventful. The problems returned with a vengeance in the 1998 elections, however, for both the RPA and the AIP.

The winner of the AIP primary election for governor was Sylvia Sullivan. Ms. Sullivan was a Democrat, who changed her party registration to AIP solely for the purpose of running for governor as an AIP candidate. She would not subscribe to the platform and beliefs of the AIP, and would not even attend AIP meetings. The AIP objected to Ms. Sullivan as its candidate, refused to endorse her, and actually endorsed the Republican candidate, John Lindauer. Voters of other political parties assisted in the victory of a Democrat in the AIP gubernatorial primary. The AIP objected, and continues to object, to the blanket primary election system which selected Ms. Sullivan, a Democrat, as its gubernatorial candidate.

The RPA had a much more serious problem. In 1998, John Lindauer came to Alaska with millions of dollars in Chicago money to buy the governorship. He decided to run for governor as a Republican. In the past, he had run for governor as an AIP candidate.

The major candidates in the Republican gubernatorial primary election were John Lindauer, Robin Taylor, and Wayne Ross. Mr. Taylor and Mr. Ross were conservative Republicans who had been active in the Republican Party for many years. Mr. Taylor is a State Senator and Mr. Ross was a member of the Republican National Committee. Mr. Lindauer had access to out-of-state money and was able to spend millions of dollars on his campaign. Mr. Ross and Mr. Taylor had difficulty raising money because of the Alaskan Campaign Finance Reform Act, and could not compete financially with Mr. Lindauer. In addition, Ross and Taylor split the conservative Republican vote. Mr. Lindauer was selected as the

Republican candidate. He would have lost to either Mr. Ross or Mr. Taylor had only one of them been running.

In this Republican primary election, a classic cross-over voting situation existed. The Democrats had one strong candidate running in the Democrat gubernatorial primary election. His victory was certain. Mr. Lindauer was known to be the Republican candidate who the Democrats could defeat most easily. Cross-over voting took place in the Republican primary, which assisted in the victory of Mr. Lindauer, although it cannot be said that this was the only reason that Mr. Lindauer won the Republican gubernatorial primary.

Once Mr. Lindauer won the Republican primary, his candidacy began to disintegrate almost immediately over questions relating to his residence, the source of his money and his continued lying. Chuck Achberger, a former employee of the Lindauer campaign, filed a complaint with the Alaska Public Offices Commission, over Mr. Lindauer's finances and his required reporting. An independent voter, Frances Grady, filed a lawsuit in the Alaska Superior Court, dealing with the same issues. (*Grady v. State*, Case No. 3AN-98-9720 CI (Sup.Ct. 3rd Jud. Dist., Alaska, pending)) Both these complaints requested that Mr. Lindauer's name be removed from the general election ballot. Neither the Alaska Public Offices Commission or the court resolved the proceedings before them prior to the 1998 general election.

The disintegration of the Lindauer campaign affected not only his campaign, but also the campaigns of Republican candidates across the board. It also affected the credibility and integrity of the Republican Party itself.

Fewer than two weeks prior to the general election, after some weeks of the only issue being "Lindauer", the RPA Party accepted the fact that it had to write-off any chance to elect a Republican governor in 1998. The RPA had to disavow Mr. Lindauer in order to save the party from a massive defeat across the entire spectrum of elective offices. The RPA withdrew its endorsement from Mr. Lindauer and recommended that voters write-in Mr. Taylor for governor. Mr. Taylor received the second-highest number of votes in the Republican gubernatorial primary. The Republican Party of Alaska had never before been forced to withdraw an endorsement of its gubernatorial candidate in a general election. The RPA objected and continues to object to a statutorily-mandated election process which forces it to accept a candidate such as Mr. Lindauer as its standard-bearer in the general election.[5]

The rules of the RPA, the AIP, and the Libertarian Party of Alaska continue to be in conflict with the Alaska blanket primary statute.[6] These parties, plus others, will

---

[5] After the 1998 general election, the Alaska Public Offices Commission, in ruling on the Achberger complaint, found numerous campaign law violations and referred the Lindauer matter to the Attorney General's office to consider criminal prosecution. In August, 1999, the Attorney General of Alaska filed a complaint charging Mr. Lindauer with twenty-three (23) violations of law which occurred during his campaign, including twenty-two (22) class A misdemeanors and one felony. *State v. Lindauer*, Case No. 3AN-99-7041 CR (Sup.Ct., 3rd Jud. Dist., Alaska, pending). This criminal complaint is still pending.

[6] The RPA has an additional problem. After the *O'Callaghan* decision, the Republican National Convention adopted National Rule 34(f), which reads as follows:

have candidates on the primary and general election ballots in 2000. The problems caused by the conflict between the party rules and the Alaska blanket primary statute will arise again in 2000, and every two years thereafter. Litigation will continue. However, the factual situation is

---

> Rule 34(f) – On or after January 1, 1997, no state law or party rule shall be observed that allows persons who have participated or are participating in the selection of any nominee of a party other than the Republican Party, including, but not limited to, through the use of a multi-party primary or similar type ballot, to participate in the selection of a nominee of the Republican Party for that general election. No person nominated in violation of this rule shall be recognized as the nominee of the Republican Party. If state law or state party rule provides for the selection of the nominee of the Republican Party in violation of this rule, the Republican nominee shall be selected by a convention convened and held under the provisions of Rule No. 32(c), unless a state party rule provides specifically to the contrary.

This rule is binding on the RPA, and could prevent any Republican candidate from being placed on the general election ballot in Alaska for the 1998 and future elections. In fact, the rule was not enforced against the RPA for the 1998 general election, but still remains effective for possible enforcement against it in the future. If it is enforced, the RPA will not be able to run *any* candidates under the Republican name in the future. Individuals will still have the right to usurp the Republican name under Alaska law, however. Individuals to whom the party objects will be able to run as Republicans, but the RPA will not be able to use the Republican name to support candidates whom it deems worthy of support.

different each time, and by the time the facts have developed, it becomes impossible to obtain relief for a particular election because of lack of time.

It is the parties' understanding that this Court has recently reaffirmed the vitality of *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and that the parties have the right to select their standard-bearers. (*Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)) However, as discussed by Justice Rabinowitz in his dissent in *O'Callaghan*, the principles of *Tashjian* are being ignored in Alaska.

The Alaskan political parties and their members need relief in the form of a final federal decision interpreting and protecting the federal Constitutional right of free political association. This is needed now in order to know the law applicable to determination of who may vote in future primary elections, and to make a determination as to how to deal with the related issue of the parties' inability to select their own candidates.

California

In their petition for certiorari, the California petitioners have clearly pointed out why a decision is needed to protect the rights of the California parties, in particular the minor parties. The proposed amici concur with the views expressed in this petition.

Nationally

California is one of the most important states of the United States. For better or worse, trends and ideas

which begin in California often spread across a large part of the country. The use of the initiative or legislative process to impose blanket primary elections in other states is one of these ideas and trends which can be expected to spread.

Arguments in favor of a blanket primary are very seductive, and the actual effect of the process is greatly misunderstood. For example, in the face of declining voter participation in the political process in the United States, proponents of a blanket primary will argue that people will be more interested in and will participate in the political process because they will be able to "vote for the person and not the party." Voters will be told that they will have more input into the political process. In fact, a blanket primary will remove much of the power from the voters to implement any policy or program. Since the candidate is not responsible to a group of voters with a coherent philosophy or program, but is elected by an amorphous group of people of various motivations, the office-holder will not represent any philosophy or program of anyone, but will have to try to please everyone in order to be reelected. This does not result in good government by and for the people.

There are very real problems with the blanket primary system, which are well-recognized, such as raiding and lack of accountability to voters. Additionally, the blanket primary system is unquestionably a serious infringement on the First Amendment right of free political association. Finally, under *Tashjian*, it appears that the blanket primary system is impermissible if contrary to the rules of the political party upon which the state desires to impose the system.

Before this system spreads any further, over the objections of the affected political parties and individuals, the issues involved and the applicable parameters need to be determined by this Court. It is bad enough that there has been a decade of litigation in Alaska, and that litigation has been filed in California immediately upon the implementation of the blanket primary system. If there is no resolution of the issues and parameters at this time, the system can be expected to spread into additional states with additional uncertainty and litigation. There is no advantage or public interest in allowing this to happen.

CONCLUSION

For the reasons set forth in the petition for certiorari and this brief amicus curiae, the petition for certiorari should be granted.

Respectfully submitted,

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No. 99-401 (4)

In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY,
CALIFORNIA REPUBLICAN PARTY,
LIBERTARIAN PARTY OF CALIFORNIA
and PEACE AND FREEDOM PARTY, *et al.*,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA
and CALIFORNIANS FOR AN OPEN PRIMARY, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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11/21/96 – Plaintiffs California Democratic Party, Torres, Bowler, and Jorjorian file their original complaint in the U.S. District Court for the Eastern District of California.

12/12/96 – Defendant Jones' original answer filed.

2/4/98 – Order permitting Californians for an Open Primary to file an answer in intervention.

2/4/98 – Original answer of intervenor-defendant/ Californians for an Open Primary.

2/5/97 – Complaint in intervention filed by plaintiffs-intervenors California Republican Party, Schroeder, Steel, Shalansky.

2/12/97 – Order permitting plaintiffs-intervenors California Republican Party, Schroeder, Steel, and Shalansky to file complaint in intervention.

3/10/97 – First amended complaint filed by plaintiffs California Democratic Party, Torres, Bowler, Jorjorian, Peace and Freedom Party, Weber, Libertarian Party of California, Lightfoot.

3/14/97 – Order permitting filing of first amended complaint joining Peace and Freedom Party, Weber, Libertarian Party of California, and Lightfoot as plaintiffs.

4/16/97 – Answer of defendant Jones and defendant-intervenor Californians for an Open Primary to first amended complaint.

5/7/97 – Answer of defendant Jones and defendant-intervenor Californians for an Open Primary to complaint in intervention.

5/29/97 – Order denying motion for reconsideration of order permitting Californians for an Open Primary to intervene.

7/22/97 – Order dismissing second cause of action in plaintiffs' complaint and in plaintiffs-intervenors' complaint.

7/28/97 – Court trial of action commenced.

10/3/97 – Oral argument to district court following post-trial briefing.

11/17/97 – Amended memorandum of opinion and findings of fact and conclusions of law entered by district court.

12/4/97 – Judgment entered by district court.

12/23/97 – Notice of appeal filed by plaintiffs.

12/24/97 – Notice of appeal filed by plaintiffs-intervenors.

1/27/98 – Order of Court of Appeals for the Ninth Circuit that plaintiffs' appeal and plaintiffs-intervenors' appeal be consolidated.

3/4/99 – Opinion and order of the Court of Appeals for the Ninth Circuit affirming judgment of the district court.

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6/4/99 – Order of court of appeals denying petition for rehearing and rejecting petition for rehearing en banc.

1/21/99 – Order allowing certiorari of the Supreme Court of the United States.

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DEMOCRATIC PARTY, ART TORRES, KATHY BOWLER, PAUL JORJORIAN, Plaintiffs, vs. BILL JONES, Secretary of State of California, Defendant.	NO. CIV-S-96-2038 DFL PAN COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF
CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER, SHAWN STEEL, and DONNA SHALANSKY, Intervenors.	

JURISDICTION

1. Plaintiffs, including the California Democratic Party and certain of its officers and members, originally brought this action to protect their rights of political association, political expression, free speech, and their right to petition the government for the redress of grievances. These rights are guaranteed by the First and Fourteenth Amendments to the United States Constitution, by 42 U.S.C. section 1983, and by Article One, Section Three, and Article Two, Section Five of the California Constitution. Plaintiffs in intervention/intervenors include the California Republican Party and certain of its officers and members who are so situated that disposition of this action will as a practical matter impair or impede their ability to protect those same rights and interests. Accordingly, intervenors have the right to intervene on the side of plaintiffs under Federal Rule of Civil Procedure 24(a). Intervenors' claims also involve questions of law and fact common to those raised by the pending lawsuit. FRCP 24(b). Jurisdiction of the federal claims is conferred upon this Court by 28 U.S.C. sections 1331, 1343(a)3), 2201, and 2202. Jurisdiction of the state claims is conferred upon this Court by 28 U.S.C. section 1367.

VENUE

2. Venue for this action properly lies within the Eastern District pursuant to 28 U.S.C. sections 1391(b) and 1392(a) in that defendant resides in the State of California and in the Eastern District, and plaintiffs' and intervenors' claims arose in the Eastern District.

PARTIES

3. Intervenor CALIFORNIA REPUBLICAN PARTY ("Republican Party") is the duly authorized and officially recognized Republican Party of the State of California. It is an unincorporated association of individuals who have joined together to advance common political beliefs. The Republican Party nominates candidates for public office by primary election. Voting in the Republican Party primary elections is restricted by California Republican Party Rules to Republicans.

4. Intervenor MICHAEL SCHROEDER ("Schroeder") is the duly elected Vice-Chair of the Republican party and intervenor SHAWN STEEL ("Steel") is the duly elected Treasurer of the Republican Party. Intervenors Schroeder and Steel are registered to vote in California as Republicans. Said intervenors do not want to allow non-Republicans to vote for and choose Republican nominees for public office.

5. Intervenor DONNA SHALANSKY is a registered Republican voter in Sacramento County and regularly votes in the primary election. She does not want to allow non-Republicans to vote for or choose Republican nominees for public office.

6. Defendant BILL JONES ("Jones") is the Secretary of State of California. He is California's chief elections officer and administers the provisions of California's Elections Code. Among his duties is the enforcement of state election laws. He is sued in his official capacity only.

FACTUAL ALLEGATIONS

7. In March 1996, the California voters passed Proposition 198, which is a statutory initiative that adds or amends nine sections of the Elections Code. A true and correct copy of Proposition 198 is attached as Exhibit A.

8. Proposition 198 dramatically changes how primary elections are conducted in California including who may vote in them. It requires that in such elections any registered voter may vote for a candidate regardless of the voter's political affiliation. Each voter will be given the same primary ballot on which all candidates will appear. All candidates for a particular office will be listed together and identified by party affiliation. Voters will be able to vote for a candidate from one party for one particular office and, if they wish, for a candidate from another party for a different office. There is one exception: only party members will be allowed to vote for party central committee members.

9. The California Republican Party prohibits non-Republicans from voting in Republican primaries. In this regard article, I section 1.00(a) of the California Republican Party By-Laws states in pertinent part:

> The Committee shall recognize only those partisan nomination processes under California law that limit the electorate for partisan nomination elections to registered Republican voters, and which do not impose upon the Committee, without its express concurrence, a nomination process open to voters registered in other parties or as decline to state.

(See Exhibit B, By-Laws of the California Republican Party, attached hereto and incorporated by reference.)

10. The Republican National Committee also only recognizes Republican candidates nominated through a primary election at which only Republicans may vote, or if there is a non-partisan or open primary only those candidates "endorsed by convention held under the authority of the state Republican Party. . . . " See Exhibit C, the Rules of the Republican Party attached hereto and incorporated herein by this reference.

11. Unless this Court takes the actions requested herein, the Republican Party and its members will be deprived of their right to select their own candidates. Proposition 198 allows non-Republicans to cross party lines and choose Republican nominees. Accordingly, Proposition 198 will allow the nomination of "Republican" candidates who are not supported by a majority of Republican voters. Proposition 198 conflicts with the rules and by-laws established by the state and national Republican parties to govern their selection of candidates.

12. Proposition 198 is invalid and unenforceable because it violates intervenors' rights of political association, political expression, free speech, and their rights to petition government for redress of grievances. Defendant maintains that Proposition 198 is valid and enforceable and that plaintiffs and intervenors are bound by its terms. Thus, an actual controversy has arisen and now exists between the parties within the scope of 28 U.S.C. section 2201, in which the preservation of the constitutional rights of intervenors requires a declaration of the rights

and other legal relations of the parties, and specifically a declaration that Proposition 198 is unconstitutional.

13. Intervenors have suffered and will continue to suffer irreparable injury as a result of Proposition 198 and defendant's conduct. Intervenors have no plain, speedy, or adequate remedy at law. Accordingly, intervenors are entitled to injunctive relief which is necessary to preserve the status quo and their constitutional rights.

FIRST CAUSE OF ACTION

[First and Fourteenth Amendments to the United States Constitution]

14. Intervenors reallege and incorporate paragraphs 1-13 above.

15. Proposition 198 violates the First and Fourteenth Amendments to the United States Constitution because it denies intervenors their rights of association, of political expression, of free speech, and their right to petition government for the redress of grievances.

SECOND CAUSE OF ACTION

[Article One, Section Three, and Article Two, Section Five of the California Constitution]

16. Intervenors reallege and incorporate paragraphs 1-15 above.

17. Proposition 198 violates Article One, Section Three, and Article Two, Section Five of the California Constitution because it denies intervenors their rights of association, political expression, free speech, and their right to petition government for the redress of grievances.

RELIEF

WHEREFORE, intervenors pray for relief as follows:

1. That this Court declare that Proposition 198 violates the First and Fourteenth Amendments to the United States Constitution, and Article One, Section Three, and Article Two, Section Five, of the California Constitution.

2. That defendant and all others acting in concert with him be enjoined from enforcing Proposition 198.

3. That intervenors be awarded their costs, expenses, and attorneys' fees.

4. That this Court grant such other and further relief as the Court may deem just and proper.

DATED: January 24, 1997.

NIELSEN, MERKSAMER,
PARRINELLO, MUELLER
& NAYLOR

BY: /s/ John E. Mueller
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C.T. WEBER, LIBERTARIAN PARTY OF
CALIFORNIA, and GAIL LIGHTFOOT

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DEMOCRATIC PARTY, ART TORRES, KATHY BOWLER, PAUL JORJORIAN, PEACE AND FREEDOM PARTY, C.T. WEBER, LIBERTARIAN PARTY OF CALIFORNIA, and GAIL LIGHTFOOT,

Plaintiffs,

vs.

BILL JONES, SECRETARY OF STATE OF THE STATE OF CALIFORNIA,

Defendant.
_____/

NO. CIV-S-96-2038
DFL PAN

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed March 10, 1997)

CALIFORNIA
REPUBLICAN PARTY,
MICHAEL SCHROEDER,
SHAWN STEEL, DONNA
SHALANSKY,

Intervenors/Plaintiffs,

_____/

CALIFORNIANS FOR AN
OPEN PRIMARY,

Intervenor/Defendant.

_____/

JURISDICTION

1. This action is brought to protect plaintiffs' rights of political association, political expression, free speech, and plaintiffs' right to petition government for the redress of grievances. These rights are guaranteed by the First and Fourteenth Amendments to the United States Constitution, by 42 U.S.C. section 1983, and by Article One, Section Three, and Article Two, Section Five of the California Constitution. Jurisdiction of the federal claims is conferred upon this Court by 28 U.S.C. sections 1331, 1343(a)(3), 2201, and 2202. Jurisdiction of the state claims is conferred upon this Court by 28 U.S.C. section 1367.

VENUE

2. Venue for this action lies within the Eastern District pursuant to 28 U.S.C. sections 1391(b) and 1392(a) in that defendant resides in the State of California and in the Eastern District, and plaintiffs' claims arose in the Eastern District.

PARTIES

3. Plaintiff CALIFORNIA DEMOCRATIC PARTY ("CDP") is the duly authorized and officially recognized Democratic Party of the State of California. It is an unincorporated association of individuals who have joined together to advance common political beliefs. For more than 100 years the CDP has nominated candidates for public office either by convention or, since about the turn of the century, by primary election. Voting in the CDP's primary elections (and before that participating in the CDP's nominating conventions) has always been limited to Democrats.

4. Plaintiff ART TORRES is the duly elected Chair of the California Democratic Party and plaintiff KATHY BOWLER is the Executive Director of the California Democratic Party. Plaintiffs TORRES and BOWLER are registered Democratic voters in California. Plaintiffs TORRES and BOWLER do not want to allow non Democrats to choose Democratic nominees for public office.

5. Plaintiff PAUL JORJORIAN is a registered Democratic voter in Sacramento County, California. He has been a registered Democrat for more than 25 years and regularly votes in the primary election. He does not want to allow non-Democrats to choose Democratic nominees for public office.

6. Plaintiff PEACE AND FREEDOM PARTY ("PFP") is the duly authorized and officially recognized Peace and Freedom Party active in the State of California. *See* California Elections Code §§ 7700 et seq. It is an unincorporated association of individuals who have joined together to advance common political beliefs. Since the

party's creation in 1967, PFP has nominated candidates for public office by primary election. Voting in PFP's primary elections has always been limited to Peace and Freedom Party members.

7. Plaintiff C.T. WEBER is the duly elected State Chairperson of the Peace and Freedom Party. He is a registered Peace and Freedom voter in California. Plaintiff WEBER does not want to allow non-Peace and Freedom Party members to choose Peace and Freedom nominees for public office.

8. Plaintiff LIBERTARIAN PARTY OF CALIFORNIA ("LPC") is the duly authorized and officially recognized Libertarian Party active in the State of California. It is an unincorporated association of individuals who have joined together to advance common political beliefs. Since the party's qualification for the ballot in 1980, the party has nominated candidates for public office by primary election. Voting in the party's primary elections has always been limited to Libertarian Party members.

9. Plaintiff GAIL LIGHTFOOT is a registered Libertarian voter in San Luis Obispo County, California. She has been a registered Libertarian since 1972 and regularly votes in the primary election. She does not want to allow non-Libertarians to choose Libertarian nominees for public office.

10. Defendant BILL JONES is the Secretary of State of California. He is California's chief elections officer and administers the provisions of California's Elections Code. Among his duties is to see to it that state election laws are enforced. He is sued in his official capacity only.

FACTUAL ALLEGATIONS

[DEMOCRATIC PARTY]

11. For more than 80 years Democratic nominees for public office have been chosen at primary elections where only DEMOCRATIC PARTY members could vote.

12. The CALIFORNIA DEMOCRATIC PARTY prohibits non-Democrats from voting in Democratic primaries. Article VIII, section 2(j) of the CDP By-laws states in pertinent part "Only those voters registered as Democrats may vote in the Democratic Party Primary."

13. Every four years the Democratic National Party of the United States holds a convention at which it nominates a candidate for President of the United States, nominates a candidate for Vice-President, and adopts a national platform. Article II, section 4(j) of the Charter and Bylaws of the national party require that convention delegates "be chosen through processes which . . . restrict participation to Democrats only[.]"

[PEACE AND FREEDOM PARTY]

14. The Peace and Freedom Party was founded on June 23, 1967, by people dissatisfied with the Republican and Democratic parties. A massive voter registration drive placed the Peace and Freedom Party on the California ballot in January 1968.

15. Today the goals of the Peace and Freedom Party are set out in the Preamble to its By-Laws:

> The Peace & Freedom Party is an open, multi-tendency, movement-oriented socialist party. We are united in our common commitment to

> socialism, democracy, feminism and unionism and our common opposition to capitalism, imperialism, racism, sexism and elitism. We recognize that we do not all agree on what we mean by "socialism" or on the strategies and tactics of how to get it. We do agree that it means we can have a world where we can all be part of the democratic decision-making on how the wealth of the economy will be used because we will be owners of it, as well as the cooperative self-managing co-participants in producing it.

See Exhibit B, Peace and Freedom Party State Central Committee By-Laws, attached hereto and incorporated by reference herein.

16. Article VI, section 2 of the By-Laws prohibits non-party members from voting in party primaries:

> ELIGIBILITY TO VOTE IN PRIMARY ELECTION
>
> Any Registered or Authenticated Member of the Peace and Freedom Party, as defined in Article I of these Bylaws, shall be eligible to vote in the Peace and Freedom Party Primary Election. Local County Clerks/Registrars of Voters shall provide means for Authenticated Members of the Peace and Freedom Party to cast a partisan ballot in the Primary Election.

Exh. B.

[LIBERTARIAN PARTY]

17. The Libertarian Party of California is an affiliate state party of the national Libertarian Party which was

formed in 1971 to promote the Libertarian political philosophy in American society through the mechanism of electoral politics. The LPC has been a ballot qualified party in California since 1980.

18. As an affiliate of the national Libertarian Party, the LPC must conduct its affairs consistently with the Libertarian Party Statement of Principles, the core statement of the party's guiding principles and purpose. The Statement of Principles (attached hereto as Exhibit C and incorporated by reference herein) states, in relevant part:

> We hold that all individuals have the right to exercise sole dominion over their own lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the right of others to live in whatever manner they choose.
>
> Governments throughout history have regularly operated on the opposite principle, that the State has the right to dispose of the lives of individuals and the fruits of their labor. Even within the United States, all political parties other than our own grant to government the right to regulate the lives of individuals and seize the fruits of their labor without their consent.
>
> We, on the contrary, deny the right of any government to do these things, and hold that where governments exist, they must not violate the rights of any individual: namely (1) the right to live – accordingly we support prohibition of the initiative of physical force against others; (2) the right to liberty of speech and action – accordingly we oppose all attempts to abridge the freedom of speech and the press, as well as

government censorship in any form; and (3) the right to property – accordingly we oppose all government interference with private property, such as confiscation, nationalization, and eminent domain, and support the prohibition of robbery, trespass, fraud, and misrepresentation.

Since governments, when instituted, must not violate individual rights, we oppose all interference by government in the areas of voluntary and contractual relations among individuals. People should not be forced to sacrifice their lives and property for the benefit of others. They should be left free by the government to deal with one another as free traders; and the resultant economic system, the only one compatible with the protection of individual rights, is the free market.

Exh. C, p. 1.

19. Libertarian Party Bylaws prohibit non-Libertarians from voting in Libertarian primaries. In this regard, Bylaw 16, Section 6, states "In the event the party is legally required to participate in primary elections, only members of the Party shall be eligible to vote in the primary." *See* Exhibit D, Libertarian Party of California Bylaws, attached hereto and incorporated by reference herein.

[GENERAL]

20. In March 1996, Proposition 198 was adopted. Proposition 198 is a statutory initiative that adds or amends nine sections of the Elections Code. A true and correct copy of the March 26, 1996, Ballot Pamphlet concerning Proposition 198 is attached as Exhibit A and

incorporated by reference herein. (The full text of the initiative itself is located at page A-8.)

21. Proposition 198 requires that at all future primary elections any registered voter will be able to vote for candidates *regardless of political affiliation*. Each voter will be given the same primary ballot on which all candidates will appear. All candidates for, e.g., President, will appear together and will be identified by party affiliation. Voters will be able to mix and match as they go down the ballot. For example, a voter can vote for a Republican for President, a Democrat for California Assembly, a Green for the House of Representatives, a Peace and Freedom for U.S. Senate, and a Libertarian for California Senate, etc. The one exception is that only party members will be allowed to vote for party central committee members.

22. Unless this Court takes the actions requested herein, the PARTY PLAINTIFFS and their members will be deprived of their right to select candidates who best represent each PARTY's ideologies and preferences. Proposition 198 will allow the nomination of "Democratic," "Peace and Freedom" and "Libertarian" candidates who are not supported by a majority of those parties' voters. Proposition 198 will allow non-Democratic, non-Peace and Freedom, and non-Libertarian voters to cross party lines and choose nominees for the Democratic, Peace and Freedom, and Libertarian parties.

23. Proposition 198 creates the risk that the California Democratic Delegation will not be seated at future Democratic National Conventions because the Democratic National Committee Bylaws require delegates to be chosen by Democrats only.

24. The Elections Code requires that each person receiving a Peace and Freedom Party nomination for any partisan public office shall be declared elected as a member of Peace and Freedom Party central committees. Elections Code § 7755. Thus Proposition 198 forces the Peace and Freedom Party to accept central committee members who are elected by voters who are not members of the party.

25. Plaintiffs maintain that Proposition 198 is invalid and unenforceable because it violates their rights of political association, political expression, free speech, and their right to petition government for redress of grievances. Defendants maintain that Proposition 198 is valid and enforceable and that plaintiffs are bound by its terms. Thus an actual controversy has arisen and now exists between the parties within the scope of 28 U.S.C. section 2201, in which the preservation of the constitutional rights of the plaintiffs requires a declaration of the rights and other legal relations of the parties, and specifically a declaration that Proposition 198 is unconstitutional.

26. Plaintiffs have suffered and will continue to suffer irreparable injury as a result of defendants' conduct. Plaintiffs have no plain, speedy, or adequate remedy at law.

Accordingly, injunctive relief is necessary.

FIRST CAUSE OF ACTION

[First and Fourteenth Amendments to the United States Constitution]

27. Plaintiffs reallege and incorporate everything above.

28. Proposition 198 violates the First and Fourteenth Amendments to the United States Constitution because it denies plaintiffs their right of political association, their right of political expression, their right of free speech, and their right to petition government for the redress of grievances.

SECOND CAUSE OF ACTION

[Article One, Section Three, and Article Two, Section Five of the California Constitution]

29. Plaintiffs reallege and incorporate everything above.

30. Proposition 198 violates Article One, Section Three, and Article Two, Section Five of the California Constitution because it denies plaintiffs their right of political association, their right of political expression, their right of free speech, and their right to petition government for the redress of grievances.

RELIEF

WHEREFORE, plaintiffs pray for relief as follows:

1. That this Court declare that Proposition 198 violates the First and Fourteenth Amendments to the United

States Constitution, and Article One, Section Three, and Article Two, Section Five, of the California Constitution.

2. That defendants and all others acting in concert with them be enjoined from enforcing Proposition 198.

3. That plaintiffs be awarded their costs, expenses, and attorneys'-fees.

4. That this Court grant such other and further relief as the Court may deem just and proper.

DATED: March 10, 1997

OLSON, HAGEL, FONG, LEIDIGH, WATERS & FISHBURN, L.L.P.

By: /s/ G.W.
GEORGE WATERS

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DEMOCRATIC PARTY, et al., Plaintiffs, v. BILL JONES, Secretary of State of the State of California, Defendant.	No. CIV-S-96-2038 DFL PAN ANSWER OF SECRETARY OF STATE BILL JONES AND INTERVENOR/ DEFENDANT CALIFORNIANS FOR AN OPEN PRIMARY TO PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendant Secretary of State Bill Jones (defendant) answers plaintiffs' complaint as follows:

1. In response to paragraph 1, defendant denies that the challenged state statutes violate any rights of plaintiffs guaranteed by either the statutes or constitutions of the United States or the State of California. Defendant admits that the Court has jurisdiction of this action pursuant to 28 U.S.C. sections 1331, 1343, 2201, and 2202. Defendant denies that this court has jurisdiction of plaintiffs' state claims.

2. Defendant admits the material allegations of paragraphs 2, 10 and 20.

3. Defendant lacks sufficient information and belief to answer the allegations contained in paragraphs 3, 4, 5,

6, 7, 8, 9, 11, 12, 13, 14, 17, and 23, basing denial thereon generally and specifically denies each and every allegation contained in those paragraphs.

4. Defendant denies each and every allegation contained in paragraphs 22, 26, 28 and 30.

5. In response to paragraph 15 and 16, defendant avers that the Preamble to the By-Laws of the Peace and Freedom Party speak for themselves and denies each and every other material allegation of those paragraphs.

6. In response to paragraphs 18 and 19, defendants avers that the Libertarian Party Statement of Principles speaks for itself and denies each and every other material allegations to those paragraphs.

7. In response to paragraph 21, defendant admits that Proposition 198 will allow voters at primary elections to vote for all candidates for all partisan and nonpartisan offices, regardless of political affiliation, excepting candidates for party central committees. Except as thus expressly admitted, defendant denies each and every remaining allegation of paragraph 21.

8. In response to paragraph 24, defendant avers that Proposition 198 and Elections Code section 7755 speak for themselves. Except as thus expressly admitted defendant denies each and every other material allegation of paragraph 24.

9. In answer to paragraph 25, defendant admits that the positions of the respective parties are correctly alleged. Except as thus expressly admitted, defendant denies each and every other allegation of paragraph 25.

10. In response to paragraph number 27, defendant incorporates his answers to paragraphs 1 through 26, inclusive, as set forth above.

11. In response to paragraph number 29, defendant incorporates his answers to paragraphs 1 through 28, inclusive, as set forth above.

AFFIRMATIVE DEFENSES

By way of further answer to plaintiffs' First Amended Complaint, defendant alleges as follows:

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' First Amended Complaint For Declaratory and Injunctive Relief fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

To the extent that the challenged statutes govern the nomination of candidates for United States Senate or House of Representatives, the statutes are a permissible regulation of the time, place, and manner of holding such elections within the meaning of article I, section 4, of the United States Constitution.

THIRD AFFIRMATIVE DEFENSE

To the extent that the challenged statutes govern nomination of candidates for state or local offices, the power to so regulate such elections is reserved to the

State and People of California by the Tenth Amendment to the United States Constitution.

FOURTH AFFIRMATIVE DEFENSE

The challenged statutes advance important interests of the State and People of California and, to the extent they impose any burden whatsoever on cognizable constitutional rights, impose only a reasonable and nondiscriminatory restriction upon plaintiffs' asserted First and Fourteenth Amendments.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' Second Cause of Action, asking this Court to declare and enjoin alleged violations of the California Constitution, is not within the jurisdiction of this Court and is barred by the sovereign immunity provisions of the Eleventh Amendment.

WHEREFORE, defendant Bill Jones, Secretary of State of the State of California, requests the following relief:

1. The complaint for declaratory relief be denied, and Proposition 198 be declared constitutional;

2. The prayer for injunctive relief be denied;

3. The claim for costs, expenses, and attorneys' fees be denied, and that plaintiffs take nothing by this action;

4. Judgment be entered for defendant;

5. Defendant be awarded costs of suit and attorneys' fees pursuant to 42 U.S.C. section 1988; and

6. Defendant be awarded such other and further relief as this Court deems proper.

Dated: APRIL 14, 1997.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DEMOCRATIC PARTY, ART TORRES, KATHY BOWLER, PAUL JORJORIAN,

Plaintiffs,

v.

BILL JONES, Secretary of State of the State of California,

Defendant.

CALIFORNIA REPUBLICAN PARTY, MICHAEL SHROEDER, SHAWN STEEL, DONNA SHALANSKY,

Intervenor/Plaintiffs,

CALIFORNIANS FOR AN OPEN PRIMARY

Intervenor/Defendant.

CASE NO. CIV-S-96-2038 DFL PAN

ANSWER OF DEFENDANT SECRETARY OF STATE BILL JONES AND INTERVENOR DEFENDANT CALIFORNIANS FOR AN OPEN PRIMARY TO COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendant Secretary of State Bill Jones and Intervenor/Defendant Californians For An Open Primary ("Defendants") answer Intervenor/Plaintiffs' Complaint in Intervention as follows:

1. In response to paragraph 1, Defendants deny that the challenged state statutes violate any rights of Intervenor Plaintiffs guaranteed by either the statutes or constitutions of the United States or the State of California. Defendants admit that the Court has jurisdiction of this action pursuant to 28 U.S.C. sections 1331, 1343, 2201, and 2202.

2. Defendants admit the material allegations of paragraphs 2, 6, 7 and 8.

3. Defendants lack sufficient information and belief to answer the allegations contained in paragraphs 3, 4, 5, 9 and 10, and basing denial thereon generally and specifically deny each and every allegation contained in paragraphs 3, 4, 5, 9 and 10.

4. In response to paragraph 11, Defendants admit that Proposition 198 will allow voters at primary elections to vote for all candidates for all partisan and nonpartisan offices excepting candidates for party central committees. Except as thus expressly admitted, Defendants deny each and every remaining allegation of paragraph 11.

5. In answer to paragraph 12, Defendants admit that the positions of the respective parties are correctly alleged. Except as thus expressly admitted, Defendants deny each and every other allegation of paragraph 12.

6. Defendants deny each and every allegation contained in paragraph 13.

7. In response to paragraph number 14, Defendants incorporate their answers to paragraphs 1 through 13, inclusive, as set forth above.

8. Defendants generally and specifically deny each and every allegation in paragraph number 15.

9. In response to paragraph number 16, Defendants incorporate their answers to paragraphs 1 through 15, inclusive, as set forth above.

10. Defendants generally and specifically deny each and every allegation in paragraph number 17.

AFFIRMATIVE DEFENSES

By way of further answer to Intervenor/Plaintiffs' Complaint in Intervention, Defendants allege as follows:

FIRST AFFIRMATIVE DEFENSES

Intervenor/Plaintiffs' Complaint in Intervention and Injunctive Relief fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSES

To the extent that the challenged statutes govern the nomination of candidates for United States Senate or House of Representative, the statutes are a permissible regulation of the time, place, and manner of holding such elections within the meaning of article I, section 4, of the United States Constitution.

THIRD AFFIRMATIVE DEFENSES

To the extent that the challenged statutes govern nomination of candidates for state or local office, the

power to so regulate such elections is reserved to the State and People of California by the Tenth Amendment to the United States Constitution.

FOURTH AFFIRMATIVE DEFENSES

The challenged statutes advance important interests of the State and People of California and, to the extent they impose any burden whatsoever on cognizable constitutional rights, impose only a reasonable and nondiscriminatory restriction upon Intervenor/Plaintiffs' asserted First and Fourteenth Amendments.

FIFTH AFFIRMATIVE DEFENSES

Intervenor/Plaintiffs' Second Cause of Action, asking this Court to declare and enjoin alleged violations of the California Constitution, is not within the jurisdiction of this Court and is barred by the sovereign immunity provisions of the Eleventh Amendment.

WHEREFORE, Defendant Secretary of State Bill Jones and Intervenor/Defendant Californians For An Open Primary request the following relief:

1. The complaint in intervention for declaratory relief be denied, and Proposition 198 be declared constitutional;

2. The prayer for injunctive relief be denied;

3. The claim for costs, expenses, and attorneys' fees be denied, and that Intervenor Plaintiffs take nothing by this action;

4. Judgment be entered for Defendants;

5. Defendants be awarded costs of suit and attorneys' fees pursuant to 42 U.S.C. section 1988; and

6. Defendants be awarded such other and further relief as this Court deems proper.

DATED: May 6, 1997

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DAISY C. WU

By: /s/ Daisy C. Wu
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CALIFORNIA and GAIL LIGHTFOOT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DEMOCRATIC PARTY, ART TORRES, KATHY BOWLER, PAUL JORJORIAN, PEACE AND FREEDOM PARTY, C.T. WEBER, LIBERTARIAN PARTY OF CALIFORNIA and GAIL LIGHTFOOT,

Plaintiffs,

vs.

BILL JONES, SECRETARY OF STATE OF THE STATE OF CALIFORNIA,

Defendant.
_____/

NO. CIV-S-96-2038 DFL PAN

STIPULATION AND ORDER DISMISSING PLAINTIFFS' SECOND CAUSE OF ACTION

(Filed Jul. 28, 1997)

CALIFORNIA
REPUBLICAN PARTY,
MICHAEL SCHROEDER,
SHAWN STEEL, DONNA
SHALANSKY,

Intervenors/Plaintiffs,
_____/

CALIFORNIANS FOR AN
OPEN PRIMARY,

Intervenor/Defendant.
_____/

NOW COME ALL PARTIES to this action, by and through their counsel of record, and stipulate to the following:

WHEREAS, Defendant Secretary of State Bill Jones is the Chief Elections Officer of the State of California;

WHEREAS, the State of California is generally immune from suit in federal court under the Eleventh Amendment of the United States Constitution, unless such suit is specifically authorized or immunity is specifically waived; and

WHEREAS, there has been no specific authorization for suit against the State on claims arising from the California Constitution, and no waiver of Eleventh Amendment Immunity by defendant Jones;

THEREFORE, all parties hereby agree that the Second Cause of Action contained in Plaintiffs' First Amended Complaint and the Second Cause of Action

contained in Intervenor-Plaintiff's Complaint, both alleging violations of the California Constitution, shall be dismissed without prejudice.

OLSON, HAGEL, FONG, LEIDIGH, WATERS & FISHBURN

DATED: July 15, 1997

By: /s/ M B Moylan
GEORGE WATERS
MARY-BETH MOYLAN
Attorneys For Plaintiffs

OFFICE OF THE ATTORNEY GENERAL

DATED: July 14, 1997

By: /s/ Kyungah Suk
CYRUS J. RICKARDS
ALLEN SUMNER
KYUNGAH SUK
Attorneys For Defendant

NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR

DATED: 7-14, 1997

By: /s/ John E. Mueller
JOHN E. MUELLER
Attorneys For Intervenors/ Plaintiffs

GIBSON, DUNN
& CRUTCHER

DATED: 7/14, 1997

By: /s/ Kyungah Suk for
Daisy Wu
JAMES P. CLARK
DAISY C. WU
Attorneys For
Intervenor/
Defendant

ORDER

Pursuant to stipulation of the parties to this action, the Plaintiffs' Second Cause of Action and the Intervenor-Plaintiff's Second Cause of Action are hereby dismissed without prejudice.

IT IS SO ORDERED.

DATED: 7/21, 1997

/s/ David F. Levi
HONORABLE DAVID F. LEVI

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
[Caption Omitted In Printing]

PLAINTIFFS
EXHIBIT 5

REPORT OF

RICHARD WINGER

I. BACKGROUND: MINOR PARTIES IN CALIFORNIA

California has a rich history of minor party participation in elections. Minor parties appeared on the statewide ballot in every partisan statewide California election in the last 120 years, except only two elections. Only seven other states can say the same.[1]

Sixteen minor parties have nominated by primary in California. They are described below. The years in parentheses, following the party name, indicate the years the party placed nominees on the California general election ballot. The direct primary in California started in 1910. At the time, a party was qualified if it had polled at least 3% of the vote for any statewide candidates in the last general election, or if it submitted a petition signed by 3% of the last gubernatorial vote. The 1929 legislature (by a

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[1] In the last 120 years, the only states in which a minor party has appeared on the statewide ballot, in *all* years in which a regularly-scheduled election for presidential electors, governor or U.S. Senator, was held, are Michigan, Minnesota, New Jersey, New York, and Wisconsin. In Pennsylvania minor parties missed just one such election (1990), and in Massachusetts and California they missed two such elections (1978 and 1986 in Massachusetts, and 1964 and 1966 in California).

unanimous vote in both houses) lowered the petition requirement to 1% of the last gubernatorial vote, and added an alternate registration membership of 1% of the last gubernatorial vote. The 1937 legislature raised the petition alternative to 10% of the last gubernatorial vote, but kept the registration alternate at 1%.

1. *Socialist*, 1900-1938. The Socialist Party elected a few state legislators in California during the 1910's decade, and was, of course, the California branch of the Socialist Party, organized throughout the United States from 1900 to the present day. It stood for public ownership of the means of production, recognition of collective bargaining rights for labor unions, and a public social welfare system. The Socialist Party went off the ballot in California after the 1938 election because it failed to poll as much as 3% of the vote for any statewide office that year.

2. *Prohibition*, 1875-1964. The Prohibition Party elected a congressman from California in 1914, Charles Randall, and re-elected him in 1916 and 1918. The party also elected an Assemblyman in California in 1914. In 1932, the party's nominee for U.S. Senate, Rev. Robert P. Shuler, polled 25.8% of the vote and carried Orange and Riverside Counties. The party was the California branch of the Prohibition Party, organized throughout the United States from 1869 to the present day. The party favored a ban on the manufacture and sale of beverage alcohol. The party always believed that any law imposing prohibition would fail, unless a political party determined to enforce the law were in power. The party also felt that the governing political party should be composed of dedicated Christians, and argued that most Democratic and Republican

Party politicians are not truly dedicated to Christian principles. The party went off the ballot in January 1964, for failing to keep its registration above 1/15th of 1% of the statewide registration total.

3. *Independence League*, 1906-1910. The Independence League was financed by William Randolph Hearst to fight for progressive ideas, such as direct election of U.S. Senators, nomination by primaries, the initiative, the eight-hour workday, prohibition of child labor, workers compensation laws, a federal reserve bank, and anti-trust legislation. It polled 14.4% of the vote for Governor in 1906, but it fared poorly afterwards and had been abandoned by 1910.

4. *Progressive*, 1914-1918. The Progressive Party was formed in 1912 by former President Theodore Roosevelt, after Roosevelt failed to get the Republican nomination for president. The party stood for the initiative, recall, presidential primaries in all states, women's suffrage, limitations on campaign contributions, prohibition of child labor, the eight-hour workday, minimum wage laws, workers compensation laws, a federal reserve bank, and stronger protection for natural resources. The party wasn't formed in California until 1914 (there was no need for the party in California in 1912, since the California Republican Party bolted the Republican national ticket and declared Roosevelt to be its own nominee). In 1914 the Progressive Party nominated Hiram Johnson as its gubernatorial candidate, even though he was the incumbent and had been elected as a Republican in 1910. In 1914 Johnson defeated his Republican and Democratic

opponents. The Progressives also elected several members of the U.S. House and California legislature in 1914. The party ceased to be active after the 1916 election.

5. *Liberty*, 1932-1934. This party existed nationally only in 1932. It was organized to fight the depression by expanding the number of silver coins in circulation. It also advocated government ownership of banks, a five-year moratorium on mortgage foreclosures, demonitarization of gold, and a referendum before Congress could declare the nation to be at war. The party ceased to be organized after the 1932 election.

6. *Communist*, 1934-1944. Across the nation, the Communist Party ran candidates in elections from 1921 until the present. During the 1920's it was called the Workers Party. It was unable to qualify for the California ballot before 1934 because, before that year, it was unable to successfully obtain the signatures of 1% of the last gubernatorial vote (it had tried unsuccessfully in previous elections). Its 1932 platform called for unemployment insurance, emergency relief for the poor, a moratorium on mortgage foreclosure, equal rights for African-Americans and self-determination for that portion of the U.S. South which had African-American majorities, and for the creation of a workers soviet which would rule the nation. In 1943 the California legislature, motivated by a desire to eliminate the party, added a registration test (to be met in addition to the vote test) of one-tenth of 1% of the total state registration (no other party had registration under one-tenth of 1%). The Communist Party ceased to be qualified in March 1944 because it failed the new registration test. Nationally, the Communist Party continues to

exist, although it has not run a presidential candidate since 1984.

7. *Progressive*, 1934-1940. This Progressive Party (unlike Progressive Parties of the 1910's, 1920's, and 1940's decades) existed only in California. It was formed by U.S. Senator Hiram Johnson in 1933 because he feared that he could not be re-nominated by the Republican Party when he was up for re-election in 1934. As it turned out, he was more popular than he anticipated, and he won the nomination of three parties (Republican, Democratic and Progressive) in 1934. The Progressive Party elected Franck Havenner congressman from San Francisco in 1936, the last time a minor party won a partisan election in California. Havenner later switched his membership to the Democratic Party and was re-elected as a Democrat. Technically, the Progressive Party failed to be qualified after the November 1938 election, because it didn't poll as much as 3% for any of its statewide candidates, but due to an error by the California Secretary of State, it also appeared on the ballot in 1940.

8. *Commonwealth*, 1934-1938. Like the Progressive Party of 1934, this party was formed only in California, and for the specific purpose of backing a single candidate, Raymond L. Haight, for Governor in 1934, Haight, who was cross-endorsed by the Progressive Party, won the endorsement of the McClatchy newspaper chain and carried El Dorado, Fresno and Stanislaus Counties, but placed third with 13.0% of the vote. He presented himself as the moderate choice, standing between the conservative Republican incumbent and the Democratic nominee, Upton Sinclair, who had been the Socialist Party nominee for Governor in 1930. The Commonwealth Party had no

candidates in 1936 and only one in 1938. It ceased to exist because it failed to poll 3% of the vote in 1938.

9. *Townsend*, 1938-1942. It existed only in California and Connecticut; there was no national Townsend Party. The party was organized to support the Townsend Plan, advocated by Frances Townsend. The plan advocated pensions for every elderly person of $30 per month (nicknamed "Ham and Eggs"). Townsend argued that the recipients of the money would spend it, thus stimulating commerce and ending the depression. The party went off the ballot after 1942 for failing to meet the vote test.

10. *Independent Progressive*, 1948-1954. It was formed by former vice-president Henry Wallace, who became its first presidential candidate. It is the only party in California history that ever qualified by submitting a petition signed by 10% of the last gubernatorial vote (at that time, 275,100 signatures were required). It advocated a negotiated settlement of differences with the Soviet Union, an end to the peacetime draft, abandonment of military bases abroad, the outlawing of the atomic bomb, independence for Puerto Rico, a federal anti-lynching bill, a ban on poll taxes, lowering the voting age to 18, a food stamp program, a federal housing program, full political rights for members of the Communist Party, abolition of the House Un-American Activities Committee, an end to the Marshall Plan, and an end to segregation. It went off the ballot after 1954 for failing to meet the vote test.

11. *American Independent*, 1968-present. It was organized nationally by George Wallace, former Governor of Alabama, to serve as his vehicle for a run for the presidency in 1968. It was called the American Party in many other

states. It advocated the restoration of states' rights, a Constitutional amendment providing for election of federal judges, tighter law enforcement against urban rioters, a reduction in the size of the federal government, import restrictions to protect U.S. industry, the preservation of the family farm, school prayer, a lifting of sanctions against South Africa, and opposition to gun controls. Nationally, the American Independent Party no longer exists. The California branch of the party, still on the ballot, functions as the California unit of the U.S. Taxpayers Party, whose platform calls for the abolition of the Internal Revenue Service, for limiting the role of the federal government to those functions mentioned in the U.S. Constitution, and for an end to all legal abortions.

12. *Peace & Freedom*, 1968-present. It was organized in 1968 to nominate a presidential candidate who would oppose U.S. involvement in Vietnam. In 1971 the California PFP became the California branch of the Peoples Party, which advocated full rights for young people, the 30-hour week at 40 hours pay, free mass transportation, community board control over local police, an end to the draft, free medical care for everyone, the decriminalization of psychoactive drugs, an abolition of the Universal Code of Military Justice, and a bill of rights for prisoners. In 1974 the California Peace & Freedom Party formally declared itself in support of socialism. Various other socialist parties, too weak to qualify for the California ballot under their own banner, have frequently sought to persuade the Peace & Freedom Party to nominate their own candidates, and many contested Peace & Freedom Party primaries have been between the candidates of such parties, such as the Democratic Workers Party, the

Internationalist Workers Party, the Communist Party, the Socialist Party, the New Alliance Party, and the Workers World Party.

13. *Libertarian,* 1980-present. The party was organized in 1971, but it was not able to qualify for the California ballot until 1980. The Libertarian Party is the first minor party to place its presidential candidate on the ballot of all states, two elections in a row, since the Socialist Party last accomplished this feat in 1912 and 1916. Also, the Libertarian Party is the only minor party which has elected any state legislators in at least two states, in the last sixty years. The Libertarian Party's statement of principles, unchanged since 1972, states, "We hold that all individuals have the right to exercise sole dominion over their own lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live in whatever manner they choose . . . People should not be forced to sacrifice their lives and property for the benefit of others. They should be left free by government to deal with one another as free traders; and the resultant economic system, the only one compatible with the protection of individual rights, is the free market." Consequently, the party opposes involuntary taxation and would legalize victimless crimes.

14. *Green,* 1992-present. Green Party candidates first appeared on various ballots in the U.S. in 1986, but the party wasn't able to qualify in California until 1992. The party is based on four holistic principles, Ecology, Social Justice, Non-violence, and Participatory Democracy. The

party's "Ten Key Values" are ecological wisdom, grassroots democracy, nonviolence, social justice, decentralization, community-based economics, postpatriarchal values, respect for diversity, personal and global responsibility, and future focus. Its first presidential candidate, Ralph Nader, in 1996 based his campaign primarily on the need to end corporate domination of the economy.

15. *Natural Law,* 1996-present. The Natural Law Party was organized nationally in 1992, in the United States and in many foreign nations, by the Transcendental Meditation movement. It was unable to get on the California ballot until 1996. The platform calls for natural health care programs to prevent disease and promote health; natural, sustainable agriculture; renewable energy production and conservation; less crime and better education by the use of meditation in prisons and schools, and more research to discover effective solutions to various vexing social problems.

16. *Reform,* 1996-present. The Reform Party was proclaimed by Ross Perot in late 1995. Although the press has tended to treat the party as though it were organized only to support the Perot 1996 presidential candidacy, the Reform Party had hundreds of candidates for office other than president in 1996. It stands for campaign finance reform, expansion of the initiative process, a shorter campaign season, the elimination of the electoral college, elections held on weekends, greater prohibitions on lobbying by former government officials, smaller congressional pensions, the elimination of tax loopholes on favored businesses, controls on entitlements, and opposition to NAFTA.

II. MINOR PARTIES IN THE U.S.: WHY DO THEY RUN?

As the preceding section suggests, people join minor parties because they have strong ideas about what public policy should be, and they observe, to their regret, that neither the Democratic nor Republican Parties support those ideas. Most people who choose to be active in minor parties are reconciled to the likelihood that those minor parties will win few, if any elections to important policy-making positions. Nevertheless, activists in minor parties believe that by running for office, or supporting the election campaigns of their fellow party members, they are helping to move public policy in the desired direction. Minor party activity is a means by which advocates of new ideas, propagate those ideas.

There is substantial historical evidence to support the conclusion that persistent minor party campaigning can eventually influence public policy. The first minor party to advocate that slavery be abolished, the Liberty Party (which was launched in 1840), enjoyed very little support. Its presidential candidate aroused such hostility that he was forcibly prevented from speaking, not only in the South, but in the North. He only polled seven-tenths of 1% of the 1840 presidential vote total. But his campaign served to spread the abolition idea, to bring people who agreed with that idea into communication with each other, and to change the thinking of many ordinary people who otherwise would not have been exposed to the party's arguments.

One may note, upon reading Section 1 of this report, that many of the ideas advocated by the early minor parties,

have long since been adopted as public policy. Collective bargaining rights, women's suffrage, direct election of U.S. Senators, the eight-hour day, abolition of child labor, anti-monopoly legislation, an end to segregation, the initiative, and other ideas, faced overwhelming hostility and opposition when they were first advocated. All these ideas were advocated by minor parties, decades before the major parties accepted them, yet now we take them for granted.

III. NOMINATION OF MINOR PARTY CANDIDATES

Minor parties desire to nominate as candidates, those people who are most skilled at explaining the party's positions. Consequently, minor parties, especially ideological minor parties (and most minor parties are ideological), generally prefer to nominate candidates by convention, rather than by primary, since party officers and activists (the kind of people likely to attend a nominating convention) are more familiar with the personal characteristics of various potential candidates. Most states accommodate this desire. In 41 states, new or small political parties are permitted to place candidates on the general election ballot, with the party label, without nominating those candidates in a primary election. Only Alaska, California, Hawaii, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, and Tennessee, require that all parties must nominate all their candidates by primary (technically, the Louisiana primary doesn't even provide for party nomination of candidates; it functions as a general elected, with a later run-off if no one gets 50% in the first election). And Hawaii, one of these eight states,

at least provides that minor parties have the power to block anyone from entering the party's primary, if the party feels that the proposed candidate is not sympathetic to the party's views (for example, in 1994, the Hawaii Green Party blocked two candidates from running in the party's primary because the candidates were pro-life on the abortion issue, a stand which contradicted the party platform).

Since minor parties are forced to nominate by primary in California, they (or the candidates) attempt to mail campaign literature, describing differences between the candidates in important contested primaries, to all their registered voters, or to those registered voters who (based on past performance) are most likely to vote in the party's primary. Major newspapers and broadcasters in California generally do not cover contested minor party primaries at all. Therefore, rank-and-file registrants in minor parties (especially those who are not active in the party organization and do not attend party meetings, or receive the party newsletter) would have almost no basis for making a decision as to whom to vote for in the primary, if it weren't for direct mailings from the party or from the candidates.

Such mailings are very expensive, and minor parties don't have large budgets. Since before 1940, no minor party in California has held registration membership just prior to a primary, of as much as 1% of the number of registered voters in the state, with the sole exception of the American Independent Party (that party exceeded 1% in 1968 and also the period of 1978 to the present). Relatively small registration has meant that it is at least possible for the minor party, or a candidate in a contested

minor party primary, to communicate by direct mail with most of the party's registrants.

IV. CONTESTED MINOR PARTY PRIMARIES IN CALIFORNIA SINCE 1968

I have reviewed the *Statement of Votes* and the *Report of Registration* (official publications of the California Secretary of State) for all primary elections 1968 to the present. There are 102 contested minor party primaries in that period. Below is a chart setting forth the official totals for candidates in the 102 contested minor party primaries in California for the period 1968 to the present, the number of registered voters eligible to vote in each such contest, and the number of votes the party's nominee for that same office received in the general election:

[Table Omitted In Printing]

* * *

V. CONCLUSIONS FROM THE CONTESTED PRIMARY DATA

1. Contested minor party primaries in California are not rare.

2. Relatively few voters cast ballots in minor party primaries in California, compared to the number of people who vote for minor party nominees at the general election for the same office. The total vote cast in the contested minor party primaries, above, is only 443,785, whereas the general election vote for the winners of these contested primaries is 4,822,380. It is true that voter turnout in primaries is lower than it is in general elections; turnout in primaries in California is usually only about

60% of the general election turnout. But that factor alone cannot account for the huge (one to eleven) disparity in votes cast for minor party candidates in California primaries, versus the number cast for them in the general election.

3. In the 99 instances at which there was a contested minor party primary which produced a general election nominee, the party's general election vote was greater than the party's registration (as of the primary date) in 78 instances. Only in 21 instances was the party's general election vote smaller than its registration. The total of all registration figures in the chart above (for the 99 instances at which there was a contested minor party primary which produced a general election nominee) is 2,656,550, substantially less than the general election vote totals above of 4,822,380.

4. When point two and point three are considered together, it is obvious that a large majority of people who have voted for minor party nominees in general elections, are not registered members of those minor parties and could not vote in the primaries of those minor parties in 1996 and previous years. However, under California's new law, they will be able to vote in minor party primaries.

5. Many contested minor party primaries are extremely close. Note there are two examples above in which the winner defeated the loser by only *one* vote (American Independent, 1970, State Senate 6; and American Independent, 1970, Assembly 43). Forty-four contested primaries had margins of fewer than 100 votes.

CONCLUSION AND OPINION

In my opinion, if the new California primary law goes into effect, the vote for minor party candidates in primary elections will be *much* higher than it has been in the past. The new voters will not be party members. As a general proposition, I believe that minor party members voting in their own primary will be outnumbered by non-party members. Even where they are not outnumbered, the proportion of non-party voters will be very high – much, much higher than in major party primaries.

This will have devastating effects on the minor parties. It will, in the most fundamental way, deny party members the right to choose their own nominees. If the non-party voters have malicious intent, they will frequently be able to alter the result of a minor party primary because, as the chart set forth in section IV above shows, those primaries are frequently decided by a small number of votes. Even if the non-party voters are sympathetic to the party, they will almost certainly lack knowledge of the minor party candidates because they will not have received mail from the party. Even a small number of such voters could easily defeat the choice of party members.

Thus the new primary law will dilute the message of minor parties. One reaction to this might be to say "So what? The minor parties seldom win partisan elections anyway." As I have shown above, minor parties are generally ideological entities that have played an important role in introducing new and (at least initially) unpopular

ideas into our political culture. I believe that any restriction of that role strikes at the very heart of the minor parties' reason for existence.

In my opinion, Proposition 198 will harm California's minor parties by flooding their primaries with voters who lack knowledge of their candidates.

/s/ Richard Winger
Richard Winger
May 29, 1997

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

PLAINTIFFS
EXHIBIT 6

EXPERT REPORT OF BRUCE CAIN

June 4, 1997

REPORT ON BLANKET AND OPEN PRIMARIES

Bruce E. Cain
UC Berkeley

With the passage of Proposition 198 in March 1996, California adopted an unusual method for nominating partisan candidates – the blanket primary. The blanket primary allows independent and partisan voters to vote for candidates from any party that qualifies for the ballot. This means, for instance, that Democrats can vote in Republican party primary races, or that voters from large parties can vote in primary races for small parties such as Peace and Freedom. Only two other states employ this system specifically – Alaska and Washington – and one other state, Louisiana, uses a slight variant, the nonpartisan primary (so-called because the top two vote-getters advance to the general election regardless of their party affiliation unless one of them gets more than 50% of the vote).

The blanket primary lies at the far "open" end of a procedural spectrum that ranges from closed candidate selection by party activist caucuses at the one end to open elections by primary voters at the other. Because it prevents the parties from protecting themselves against

encroachments from opposing party voters, the blanket primary is the most burdensome of the ostensibly partisan nominating procedures with respect to party rights and operations. Allowing voters from other parties to determine another party's nominee infringes upon that party's basic right to determine its own ideas and policies. Only a purely nonpartisan process that eliminated party labels entirely would infringe to a greater degree on the parties' rights to control their own political viewpoints. Moreover, there is no evidence that the blanket primary affords indisputable advantages over other less burdensome forms of primary selection. California voters could adopt any number of other forms of primary procedures (e.g. open, semi-open, semi-closed) that would open up the process to independent voters without violating the first amendment freedom of parties so extremely.

ASSESSING THE EFFECT OF THE BLANKET PRIMARY ON CALIFORNIA'S POLITICAL PARTIES

The problematic nature of the alleged benefits of the blanket primary system would matter less if this unique procedure did not so substantially and unnecessarily infringe upon the autonomy of California political parties. Political parties are ideally teams of reasonably like-minded individuals who come together to cooperate and coordinate their activities in order to achieve their political ends. Whether the origins of political parties are internal (i.e. develop out of legislative factions) or external (i.e. develop out of electoral coalitions or extra-political organizations such as labor unions), they exist to perform

certain key functions (Duverger, 1954). First, political parties nominate individuals as official candidates in order to represent their ideas and interests in the election. In the cases of minor parties and major parties in hopeless seats (i.e. where the result in November is inevitable), the nomination act is more for the purpose of making a statement about principles and ideals than it is about picking a likely winning candidate. Such issue candidacies serve an important role in fostering educative debate during an election; a contest between candidates espousing essentially similar centrist views does not further the ideal of J.S. Mill's "free market place of ideas" as effectively as one that has at least a few issue-oriented candidates who place principles ahead of winning. Nomination is a form of political message. In this sense, the closed primary allows for the purest expression of the party's message. Allowing members of other parties to participate in a given party's primary surrenders control over that message to the party's opponents and threatens the vitality of political debate. Most members of minor parties do not join these organizations because they think their party will win. Rather, they belong to parties because they want to support candidates who will give voice to their ideas and ideologies.

Secondly, parties give nominated candidates a designation in the form of a party label that provides an extremely important information cue for voters. Even in the current era, a candidate's party label is one of the most important pieces of information that a voter can have about candidates and their likely actions in office (Campbell et al., 1960; Miller and Levitan, 1976). Party

labels evoke images in voters' minds about what candidates stand for and how they will behave once in office. Voters in California typically face a potentially bewildering array of candidates. Few, if any, have the time and the resources to inform themselves fully about each and every issue position candidates may be taking (Fiorina, 1981; Lupia and McCubbins, 1996). Knowing that Mr. C is a Democrat gives the voter a basis for expecting where Mr. C stands both on various issues and on the role of government more generally. The right to bestow the official party label upon candidates is critical to its ability to control who gets to represent the party and what that party label means to voters over time.

The third function of parties is to mobilize resources and supporters to help their nominated candidates win election. The centrality of the official party organization in providing resources to candidates fluctuates over time. In the last two decades, candidates themselves raised much of the money they needed for election, and field activities by party loyalists became less important. However, aspects of the federal campaign finance law and the recently enacted Proposition 208 seem unintentionally to be putting parties back in the center of the campaign resource picture. The 1996 Presidential election brought record amounts of so-called "soft money" contributions to state parties, and Proposition 208 has given the parties the opportunity to replace individual contributors as major fund-raising sources in the state. Aside from special interests that give to further self-interested policy goals, the other major motivation for giving is ideological – i.e. people or groups giving because they believe in the party's ideals and policies (Sorauf, 1988). Undercutting

the role of party members in the nomination of their own party's candidates potentially weakens the incentive for ideological giving and leaves the system even more vulnerable to special interest donors.

Finally, political parties provide a framework for cooperation among elected officials once in office. When the primary ballot restricts shopping across party lines, voters have to think about elected officials as a team, fostering a sense of collective responsibility for policies and positions (Haeberle, 1985). Although denied the option to choose at will in the primary, voters are still free to pick and choose across party lines in the November election. By constraining themselves to party slates in the primary, voters preserve the option of picking a reasonably like-minded team of elected officials in the fall that will work together to realize certain policy ends. If voters can cross party lines in the primary, it weakens the ability of party members to select a coherent team, and ironically, takes away an option for voters in the fall campaign.

The blanket primary affects all of the essential party functions in important, adverse ways. Because it opens the selection to independents and supporters of other parties, it is inevitable that parties will be forced in some circumstances to give their official designation to a candidate who is not preferred by a majority or even plurality of party members. For example, assume an Assembly district with 35,000 registered Democrats, 80,000 Republicans and 20,000 independent and other party identifiers. Assume also that there are two candidates running in the Democratic primary – Mr. A, a liberal, and Mrs. B, a conservative. By themselves, the Democrats might prefer

Mr. A 70% to 30%, but if only a quarter of the non-Democrats cross over to the Democratic primary (because, for instance, the race on the Republican side is uncontested) in order to support Mrs. B, the Democratic party could be forced to give its official party label to a candidate who is opposed by a vast majority of registered Democratic voters in the constituency. This is called "swamping."

The inability to control who makes the party's selection of candidates then affects the second essential party function – i.e. the right to control the party label. Years of political science research reveals that the party label is used by many voters as an information short-cut or heuristic (i.e. it helps voters know what candidates stand for without investing in information about all of their specific policy positions. See Lupia and McCubbins, 1996). Hence, losing control over who gets the label amounts to losing control in an important way over what the party stands for and what is communicated to voters about the parties. Under the circumstances of my hypothetical example, it would not be surprising if many of the 80% of the Democratic registered voters who supported Mr. A became disillusioned and refused either to work for or give resources to the election of the party's nominee whom they did not support. In turn, the third of the four essential party functions discussed above would be impaired. Finally, the fact that Mrs. B, if elected, owes her nomination to independents and Republicans weakens her incentive to cooperate or associate closely with other Democratic legislators, eroding party discipline in the legislature and weakening norms of collective responsibility (i.e. the fourth party function).

The blanket primary procedure is more violative of party rights than other forms of open primary, because it substantially lowers the costs of strategic actions. All other forms of open primaries require voters at some point to declare in which party's primary they wish to participate in. The cost of crossing over to influence one race is that the voter can only vote in that one party's primary. However, in the blanket system, the voter does not lose the opportunity to vote in his or her preferred party primary just because he or she wants to cross-over in any particular political race. Hence, the temptation to cross-over unaided by elites is greater in the blanket and nonpartisan races than in other open primary procedures. If in addition, political consultants and party leaders provide encouragement and direction, the incentive to vote strategically will be enhanced significantly.

There are two major types of cross-over behavior. The first is "shopping" which is when voters of one party cross-over to another party's primary to support the candidate whose positions they most prefer. Thus, if Republicans cross-over to the Democratic primary to support the more conservative candidate, or if Democrats cross-over to the Republican primary to support the more liberal candidate, then these would be cases of what I would term "shopping." If enough shoppers cross-over to determine the outcome of the party's primary, shopping can be decisive, and it becomes "swamping." The other form of cross-over behavior can be called "sabotage" or "raiding," which is when voters in one party cross-over to participate in another party's primary in order to elect the "weaker" candidate so that their party's candidate can prevail in November. I call it sabotage for the obvious

reason that the purpose of crossing over is not to support a preferred candidate, but to influence the outcome by forcing the other party into a weaker position.

The conditions that are most ripe for both "shopping" and "sabotage" are similar, but not identical. The key strategic condition is what I call "asymmetric competitive conditions." If one party has an uncontested race and the other a contested race, then voters who would normally participate in the uncontested race will feel more tempted to put their vote where it counts. Both shopping and sabotage are forms of strategic behavior in the sense that voters are motivated by their expectations of where their votes will count the most and not just by their policy preferences per se. Most studies of cross-over voting suggest that "shopping" is more prevalent than "sabotage" (Hedlund and Hedge, 1982; Hedlund and Watts, 1986). Recent Field Poll studies on the upcoming 1998 Senate and Gubernatorial races suggest that as many as a third of the voters may cross-over (Field Poll, Feb. 25, 1997). As discussed earlier, if enough voters "shop" across party lines, it is inevitable that parties will be stuck with nominees that their members did not prefer.

Instances of "sabotage," while less frequent, are important and especially violative of party autonomy and rights. For instance, in the Alaska Gubernatorial primary of 1974, a large number of Democrats and independents abandoned a Democratic primary that featured a virtually unopposed Democratic incumbent in favor of voting in a contested Republican primary that featured a former Governor, Walter Hickel, and a liberal Republican, Joey Hammond. Even though there were 49,000 registered Democrats, there were only 22,370 votes cast in the

Democratic primary. By comparison, there were 60,107 votes cast in the Republican primary even though there were only 26,500 registered Republicans. Hammond prevailed over Hickel 28,602 to 20,728. This can be viewed either as a case of liberal shopping that saddled the Republicans with a choice they would not have made themselves or as sabotage in the sense of helping the candidate with a weaker background. Either way, it raises serious questions about party rights and autonomy under the blanket system.

Looking at California, we can ask how likely the conditions are that encourage these types of cross-over behavior. First, I would note that we have seen attempts to sabotage other party prospects in California in recent years. Scott Baugh, a Republican Assemblyman from Newport Beach, was accused of trying to encourage a Democratic candidacy in a special election in order to divide the Democratic vote and protect Republican prospects. Or to take another example, Republican opponents of Brian Setencich may have encouraged the candidacy of a euphonious competitor, Brian Steiner, in order to confuse potential write-in voters. Given the perceived stakes of controlling the legislature, it is clear that candidates and consultants will play "hard ball" tactics when they have to in order to win.

Second, the specific conditions that are ripe for cross-over voting occur frequently enough that the temptation will be present at every primary election. Those conditions are: (1) Asymmetric competitive conditions (i.e. one competitive primary and one uncompetitive), and (2) A likely competitive race in November. In the 1996 Assembly primaries, I identified ten races that fulfilled the first

condition and four that also fulfilled the second condition: Districts 1, 8, 43 and 53. Of the ten asymmetric cases, one featured an uncontested race in the party that was certain to win in November (AD 65), and hence there was no reason to interfere in the contested primary. In five other cases (ADS 11, 14, 30, 52, 71), the uncontested race was in the party of the likely loser in November and the contested race was in the party of the likely winner. These cases are ripe for "shopping," in which voters might try to get the best deal they can in the party that is likely to win in November. Those in the likely losing party could be assured of having a standard-bearer for their party while at the same time having the chance to influence the outcome of the opposition party primary. The remaining four cases feature both asymmetric competitive primary conditions and a likely competitive race in November. Party members in the uncompetitive primary could have interfered in the decision of the party with the competitive primary to help elect the weaker candidate if they chose to. In all but one case, the outcome could have been changed by the intervention of less than 5% of the other party's registered voters. In other words, a small degree of strategic coordination could have tipped the outcome in the contested primary. This would have given the party with the uncontested primary the power to dictate the candidates of both their own and the opposition party. This is hardly what we mean by increasing choice in a democracy.

It seems clear to me that the potential harms to parties under the blanket primary are quite severe. It is not surprising that both major and minor parties would resist rules that allow members of opposing parties to

vote in their primaries. Parties will likely be forced to accept as their nominated candidate individuals who are not preferred by their members, or worse, candidates that were dictated to them by the opposing party in order to weaken their prospects in the November election. Given that the alleged benefits of the blanket primary are disputable and the potential harms are significant, it is reasonable to ask whether the aims that voters sought to achieve through the passage of Prop 198 could not be achieved through mechanisms that are less burdensome to the parties.

ASSESSING THE ALLEGED BENEFITS OF THE BLANKET PRIMARY

Those who defend the blanket primary system typically assert that is has advantages over other forms of selection: that it produces more moderate candidates; it enhances voter participation; it gives voters a wider range of choices; and it promotes the secrecy of the ballot. However, I find that these claims are neither empirically proven nor normatively indisputable.

With respect to the tendency to produce more "centrist" candidates, there is clear political science evidence that rule changes can affect the positions that party candidates take. A recent study by Barbara Norrander suggests that there may be a higher tendency for states that employ caucus nomination systems to give greater support to more ideologically distinct candidates than states with primary elections (Norrander, 1993). Another study by Elizabeth Gerber and Rebecca Morton suggests that

the same is true for closed versus open primaries (Gerber and Morton, 1997).

However, there is no consensus in democratic theory that additional ideological moderation is needed in a system that already encourages centrism in many ways, especially given that Prop 198 would seek to achieve this moderation by allowing opposition party members to interfere in another party's nomination process at will. Those who argue for additional moderation assume without proof that there is a need in California to reduce further the risks of November elections between candidates with ideologically extreme views. Occasionally, candidates that are less centrist than others win their primary nominations, but usually they lose in the November election if the other party nominates a centrist candidate of their own. In fact, there are many informed observers who think that the problem in California is exactly the opposite: i.e. they lament the lack of distinct choices in American politics and feel that the system shuts out legitimate points of view that do not fall in the middle of the ideological spectrum.

Since the publication of Anthony Downs' seminal book, *An Economic Theory of Democracy*, political scientists have come to appreciate the strength of the median voter effect in American politics (Downs, 1957). Median voter theorems suggest that candidates who take positions closer to the median (i.e. center or mid-point) of an ideological spectrum will tend to defeat those who do not, assuming single-member, simple plurality voting rules and voters who prefer candidates whose positions are closest to theirs. Sometimes this means that primary voters will choose candidates who seem to be more

potentially electable in November based on how mainstream their views are (see, for instance, the 1990 Democratic Gubernatorial primary between Feinstein and Van de Kamp, as described in Lubenow, 1991). In other instances, it means that candidates will try to move to the center after the primary in order to appeal to the swing voters in November (e.g. as Herschensohn did against Boxer in the 1992 US Senate contest). My point quite simply is that pressures to move to the center are already quite strong in California politics, and hence, it is not obvious that there is a need for additional centrist pressures.

Moreover, the mechanism that Prop 198 uses – cross-over voting by opposition party members – interferes with the impacted party's first amendment right to determine what it stands for. Whether the opposition party members are merely shopping or engaging in sabotage, they will determine by their cross-over vote what the impacted party stands for. The impacted party has lost its ability to determine its message.

A second purported benefit is that the blanket primary would increase the level of participation in primary elections. Here, we need to make a critical distinction to avoid confusion; namely, between overall turnout in a primary (i.e. the number of individuals who participate in the election) and race-specific turnout, or dropoff (i.e. the number of individuals who vote a specific office such as President, Governor, etc.). Even in a completely open system, race-specific turnout will typically be less than overall turnout for any number of reasons (e.g. disinterest in the race, ballot fatigue, lack of suitable alternatives, etc). It would seem almost tautological to state that

race-specific turnout should increase with the addition of independents. However, because it is possible that core party activists under a blanket primary system could become so alienated by the prospect of independents swamping the nomination process, decreases in activist participation might offset the gains in independent participation. But short of that depressing scenario, the number of individuals voting in partisan primary races should go up. But will it go up dramatically? A study of Senate races found that turnout in states with blanket and nonpartisan rules only had a turnout 7.2% higher than closed primary systems and 2.3% higher than those with other open systems. (Kenney, 1986). Lack of enthusiasm among the partisans may not completely offset the addition of independents, but it may diminish the potential effect considerably.

But the more interesting and important question is whether overall participation will increase. There have been many studies of participation over the last thirty years (Wolfinger and Rosenstone, 1980; Nagler, 1991; Leighly and Nagler, 1992; Texeira, 1989). None of them has ever asserted that the nomination process type is as important a determinant of whether people vote as are socioeconomic factors such as age and education, or structural factors such as the ease of registration requirements in a given state. This means that there are much more direct, effective ways to increase voter participation (e.g. mandatory voting, same-day registration, etc.) that are less burdensome with respect to party rights and autonomy (see, for mandatory voting, Hirczy, 1994).

For all of the above reasons, having a blanket primary system does not guarantee a high primary turnout

in either the general or race-specific sense. If we compare across Gubernatorial primaries in 1994, for instance, we find that Alaska with a blanket primary had a turnout of 32% while California with its closed system had a turnout of 31%. States with closed primary systems had a wide variance, ranging from a high of 42% in New Mexico's Gubernatorial primary to a low of 12% in New York's. Clearly, there are many other factors at work in determining the turnout level, and at best, the type of primary is a marginal factor.

Moreover, there is a good reason to suspect that the effect of changing from a closed to a blanket system will be even more marginal in California, especially with regard to overall primary participation. Unlike many other states, California offers voters reasons to go to the polls other than the chance to participate in partisan elections per se. For instance, primary ballots usually contain a number of state and local initiatives and referendums. In addition, some cities and counties hold their nonpartisan elections on the day of the statewide primary. As a consequence, the number of independent voters who participate in California primary elections is already significant.

One suggestion of this comes from the Field Institute's pre-election polls. In pre-election polls prior to the 1994 and 1996 primaries in California, the Field Institute found that 74% and 75% respectively of those registered as decline to state indicated that they were absolutely or fairly certain that they would vote in the upcoming primary election. This is somewhat less than what those registered as Democrats (90% and 85% respectively), and as Republicans (88% and 85% respectively) indicated, but

it impossible to say whether even this modest difference is due to the exclusion of independents from partisan races or to other factors such as their overall lower levels of interest in and attentiveness to politics (Keith et al., 1992). While pre-election polls do not tell us directly who actually voted in the primaries, it does gives us evidence about the intentions of decline-to-state voters. Judging by the gap between votes cast at the top of ticket in the partisan primary races and the total votes cast in 1994, I estimate that nonpartisan turnout was about 10% less than the overall average. Opening up partisan races to independent voters may provide a marginally stronger incentive to participate, but the increases are unlikely to be dramatic.

The last two common arguments in favor of the blanket primary are not essentially empirical claims. The first is that the blanket primary offers a wider range of choices to voters since Democrats are not restricted to voting for Democratic candidates, Republicans to Republican candidates, etc. In a certain purely quantitative sense, this is indisputable. If a voter can vote in any primary that he or she wants to, then it follows that he or she will have more choices than a person who is restricted to voting in one party's primary. However, in another more qualitative sense which I discussed earlier, blanket and open primaries could actually work to restrict choices in November more than closed primary systems do. If, as Gerber and Morton's work suggests the likelihood of nominating candidates who are further from the median is lower in open than in closed primary systems, whatever gains voters get in terms of the number and variety of choices in the primary will be offset by the lack of distinct and

meaningful choices in November. It is important to bear in mind that the right that the blanket primary preserves is the right to pick and choose between party races over the entire ballot. If California wanted to preserve the right to enter a given party's primary without violating the integrity of the party ballot as severely as the blanket primary does, the state could adopt the completely open, partially open or partially closed primary systems. Under these systems the voter can either change his/her party registration on election day (i.e. partially closed), declare a party on the day of the election (partially open) or not choose until he or she is in the voting booth (i.e. completely open). All of these systems are less vulnerable to the phenomena of swamping and raiding that I discussed earlier.

The last of the alleged benefits of the blanket primary is the greater secrecy it affords voters with respect to their partisan affiliations. Since the voter does not need to declare an affiliation in order to vote in any party's primary, voters who wish to maintain their privacy with respect to partisanship can best do so under the blanket system, or so it is alleged. However, once again, I would point out that the same level of privacy can be maintained in far less burdensome ways. The "completely open" primary requires the voters to choose one party over the others, but the voter does not have to choose until he or she is in the polling booth. Such a system would better preserve the party's autonomy and protect it from strategic intrusions from other parties, but still

afford maximum protection for voters who wish to keep their partisan preferences secret.

PARTY SOVEREIGNTY AND THE PROP 198 VOTE

The passage of Prop 198 raises an interesting political science question: if a majority of the registered Democrats and Republicans who voted in the 1996 primary favored the blanket primary, does this mean that the parties have assented to these rules? I do not presume to give a constitutional interpretation, but I do have thoughts from a political science perspective. Since the seminal work of the scholar V.O. Key, parties are thought to consist of three components: the party in government, the party in the constituency and the party as organization. The party in government refers the formal and informal ties between elected officials sharing the same party label. The party in the constituency is the term of those who register or identify with the party. The party as organization is the official party structure.

Universally, political parties experience tensions between the different components. Elected officials tend to be more responsive to what they perceive as electorally popular. Members of the party organization tend to put greater stock in ideological principle. Aside from the activists and more politically motivated voters, large portions of the electorate may be tangentially connected to the party, and only then because of the need to register or declare a party preference. A compromised synthesis of these perspectives best represents the balanced ideal of party government (Bibby, 1981).

In the past in California, the party as government has heavily regulated the party as organization or official party by statute, dictating party structure and activities through the election code. Recent court decisions have given the parties as organizations more autonomy over their affairs (e.g. SF County v. Eu). Now, with the passage of Proposition 198, we have an attempt by the party as constituency to regulate the party as organization by imposing blanket primary rules. The critical question in political science terms is where should party sovereignty lie? Which sense of the term party should decide the process of assigning the party label to potential candidates?

From a political science perspective, the official party or party as organization is the most appropriate locus of sovereignty. The party as organization is the only setting that brings all three components together at regular intervals for deliberative purposes. Party conventions are forums that convene party officials, registered voters/activists and elected officials in order to talk about matters of policy and party governance. When elected officials make decisions about party governance in their capacity as legislators, they do not have to have the support of either the official party or the party in the electorate. Similarly, when the party as the electorate dictates rule changes by initiative, it does not have to consult or get the approval of the official party of the elected officials. From the perspective of consent, the official party most legitimately represents the synthesis of these components.

Just as the imposition of rules by elected officials was an intrusion in the autonomy of the parties, so the

imposition of rules by voters does not imply the true consent of the parties. Political participation studies identify registration and voting as the least costly forms of political activity (Verba and Nie, 1992). The regulations imposed by the party in the electorate upon the official party weaken the party's ability to express an untainted message (i.e. untained by the viewpoints of other party members) and to field a slate of candidates that can act effectively as a team. The concerns of proponents – such as increasing participation in partisan races – could have been addressed by other open primary systems that better preserved the notion of collective responsibility and party automony. Instead, voters were offered an all-or-nothing chance to open up the system in the peculiar and burdensome fashion of the blanket primary. There is no way of telling whether they fully understood the implications of the system they chose, or whether they would have chosen the blanket primary system over other open systems if given the chance.

The associational rights of parties seem to me to best preserved when the official party decides its own procedures and rules subject to basic prohibitions against nondiscrimination. As long as the party does not exclude individuals on an inappropriate and unconstitutional basis such as race or gender, any system that restricts voters to choices within a slate offered in a primary preserves basic party autonomy. But when the threshold of strategic behavior is lowered considerably, as in the case of the blanket primary, the dangers of swamping and sabotage become considerable. The party's essential function to field teams of candidates with common goals is attacked and its ability to associate effectively for the

purpose of furthering political goals is seriously abridged.

/s/ Bruce E. Cain
Bruce E. Cain

June 4, 1997
Date

You Asked About

The Libertarian Party

As dissatisfaction with politics–as–usual rises at dramatic rates, more and more people across America are classifying themselves as libertarians. The Libertarian Party is the official political organization of these libertarians.

Statement of Principles

We, the members of the Libertarian Party, challenge the cult of the omnipotent state and defend the rights of the individual.

We hold that all individuals have the right to exercise sole dominion over their own lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal rights of others to live in whatever manner they choose.

Governments throughout history have regularly operated on the opposite principle; that the State has the right to dispose of the lives of individuals and the fruits of their labor. Even within the United States, all political parties other than our own grant the government the right to regulate the lives of individuals and seize the fruits of their labor without their consent.

We, on the contrary, deny the right of any government to do these things, and hold that where governments exist, they must not violate the rights of any individual: namely (1) the right to life — accordingly, we support the prohibition of the initiation of physical force against others; (2) the right to liberty of speech and action — accordingly we oppose all attempts by governments to abridge the freedoms of speech and press, as well as government censorship in any form; and (3) the right to property — accordingly, we oppose all government interference with private property, such as confiscation, nationalization, and eminent domain, and support the prohibition of robbery, trespass, fraud, and misrepresentation.

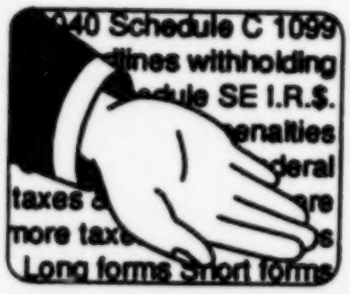
Since governments, when instituted, must not violate individual rights, we oppose all interference by government in areas of voluntary and contractual relations among individuals. People should not be forced to sacrifice their lives and property for the benefit of others. They should be left free by government to deal with one another as free traders; and the resultant economic system, the only one compatible with the protection of individual rights, is the free market.

PLAINTIFFS
EXHIBIT
10

As the name suggests, the goal of the Libertarian Party is liberty. The principles that guide the Party are the same principles that sparked the American Revolution. But why is there a need for a party dedicated to freedom? Don't Americans enjoy more freedom than anyone else?

Americans unquestionably do fare better than people in other countries, but our prosperity is the direct result of freedoms won 200 years ago in the war for independence. Since then, each passing day has seen the gradual erosion of those hard–won freedoms. If Jefferson, Franklin, and Washington were alive today, would they see the free society they fought so hard for, or would they see the repression they struggled to leave behind?

The three cornerstones of the Libertarian Party are 1) free market economics, 2) non–interventionist foreign policy, and 3) the sovereign right of individuals to conduct their lives, non–violently, as they see fit.

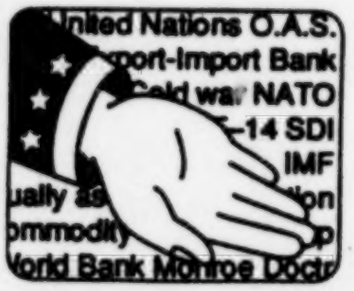


Taxes and Inflation

A key component to freedom is the right to keep the fruits of your labors. Yet today in America, government on all levels seems to be working with but one goal: the elimination of our right to keep what we produce. Unless we secure *all* our economic rights, we cannot fully enjoy personal rights, for personal freedom is impossible under economic repression.

One of the ways the Libertarian Party seeks to restore our freedoms is to eliminate the income tax. Radical? Not really. America did not have an income tax for over 100 years. The Sixteenth Amendment (which gave us the income tax) was passed amid expressions of disbelief tax rates would ever rise higher than 10 percent. You know t(rest.

Libertarians would also eliminate inflation and restore the sound money system authorized by the Constitution. Often referred to as the "hidden" tax, inflation most severely penalizes the thrifty, the poor, and those who have saved for their retirement.



Defense Spending and Foreign Policy

If you are like most Americans, you probably wonder why our government gives your tax dollars to foreign governments who seem to hate us. The sad truth is that the $13 billion in foreign aid we spent last year is a drop in the bucket compared to the $150 billion we spent defending countries such as Japan, Germany, Canada, Korea, and England.

Worse, some of this money also goes to exporting military supplies to one or both sides of civil struggles, and some is spent invasively policing the world with U.S. troops. If you read the news, you know that our foreign policies aren't making us many friends.

The Libertarian Party wants to return to the non–intel ventionist foreign policy of Thomas Jefferson, who urged, "Peace, commerce, and honest friendship with all nations, entangling alliances with none."

Business Welfare

Not all of our tax dollars are wasted abroad, of course. With billions of dollars of your money at its disposal, the government has plenty of money left over to meddle in the domestic economy. That is why you hear about massive farm subsidies (that keep food prices artificially high), costly environment clean–ups (that allow polluters to go unpunished), and savings and loan bail–outs (virtually guaranteeing that con artists can make money robbing banks from the inside).

In each case, the action taken by the government hurts consumers, and they're using your tax dollars to do it!

The Libertarian Party advocates the elimination of all business and farm subsidies, protective tariffs, and price supports, which benefit business interests at the expense of consumers and taxpayers.

War on Poverty

Americans are among the most generous people in the world, voluntarily donating over $40 billion a year to a wide range of worthy charities.

But just as libertarians believe it is wrong for the government to give your tax dollars to businesses, we believe that it is wrong for the government to take money from one person and give it to another, no matter how needy that recipient may appear.

Not only do we find government–sponsored welfare wrong, we know from experience that welfare has an overall negative effect on society. The facts show that America's "war on poverty" is being lost, not because we don't spend enough money but because the principles underlying the compulsory welfare system are themselves based on erroneous concepts of human conduct.

The Libertarian Party believes that voluntary charity and the free market provide the best solutions to supplying the needs of the elderly, the sick, and the poor.

Affordable Housing

Your tax dollars finance government–run community "redevelopment" programs that destroy hundreds of thousands of units of low–income housing. These programs work against the poor to the benefit of special interests such as banks, developers, and oil companies. The Libertarian Party opposes government interference in housing, and we believe the free market will provide affordable housing, if allowed to do so.

More than that, in reducing the size of government, the Libertarian Party will reduce government expenses, eliminating the need for the government to compete with businesses and individuals in borrowing money. This in turn will lower interest rates, making the dream of home ownership available to millions more Americans.

One way or another, big government and big government spending hurt you. The destruction of our liberty, the devaluation of our money, the instability of our economy, the crime in our streets, and many other societal ills are the direct result of runaway government.

America needs a government "of the people, by the people, and for the people." America needs the Libertarian Party.

MEMBERSHIP APPLICATION
Libertarian Party of California
P.O. Box 614
Van Nuys, CA 91408

I hereby certify that I do not believe in nor advocate the initiation of force as a means of achieving political or social goals.

_____
signature date

☐ I am voluntarily setting my dues at:
☐ $25 ☐ $50 ☐ $100 ☐ $250 ☐ Other $ _____
☐ I want to join but I can't afford the above. I am setting my dues at $15
☐ Life Membership ($500 or more)
☐ National Membership (add $15 to the above amounts)
☐ Additional donation $_____
☐ First Class Mail option for *CLNews* ($5)

Name _____
Address ☐ h ☐ w _____
City _____
State _____
ZIP _____
Home phone _____
Work phone _____

Payment:
☐ Check to "Libertarian Party of California"
☐ Please charge my: ☐ VISA ☐ MasterCard
Card # _____
Expiration date _____
Name on card _____
Signature _____
Total Amount Enclosed $ _____

For More Information:
1–(800)–637–1776

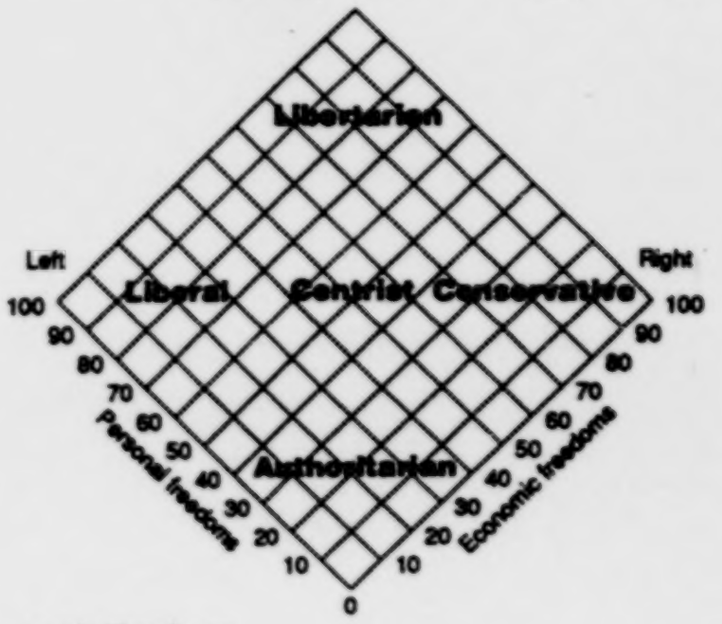
Are you a libertarian?

Answer the following questions, scoring 10 points each time you answer "My decision," 5 points each time you answer "Not Sure," and 0 points each time you answer "Gov't. decision."

Total your scores separately, and plot your personal freedom score against the left scale and your economic freedom score against the right scale. The intersection of your scores reveals your political position.

Personal Freedoms

Whose decision should it be to:	My decision	Not sure	Gov't. decision
Wear a seatbelt or helmet?	☐	☐	☐
Own a gun?	☐	☐	☐
Become a soldier?	☐	☐	☐
Help the needy?	☐	☐	☐
Pay for sex?	☐	☐	☐
Have a baby?	☐	☐	☐
Smoke dope?	☐	☐	☐
Send your child to school?	☐	☐	☐
Swim nude?	☐	☐	☐
Buy a pornographic book or video?	☐	☐	☐
Count checkmarks	___	___	___
Multiply by:	x10	x5	x0
Add multiple totals for your Personal Freedom score:	___	+ ___	= ___



Economic Freedoms

Whose decision should it be to:	My decision	Not sure	Gov't. decision
Work for $2.00 per hour?	☐	☐	☐
Buy a Japanese car?	☐	☐	☐
Play cards for money?	☐	☐	☐
Hire an unlicensed contractor?	☐	☐	☐
Compete with the Post Office?	☐	☐	☐
Hire a minority worker?	☐	☐	☐
Invest in a risky business?	☐	☐	☐
Give to a needy corporation?	☐	☐	☐
Contribute to the defense of a foreign country?	☐	☐	☐
Pay taxes?	☐	☐	☐
Count checkmarks	___	___	___
Multiply by:	x10	x5	x0
Add multiple totals for your Economic Freedom score:	___	+ ___	= ___

If you found yourself in the Libertarian region of the political map, you have scored high on the freedom scale. You have more in common with the Libertarian Party than with the Democratic or Republican Party. Take a stand for freedom: Register Libertarian.

ARE YOU A LIBERTARIAN?

The following two-part quiz is designed to help you determine if you are a libertarian; for each question, check your best answer.

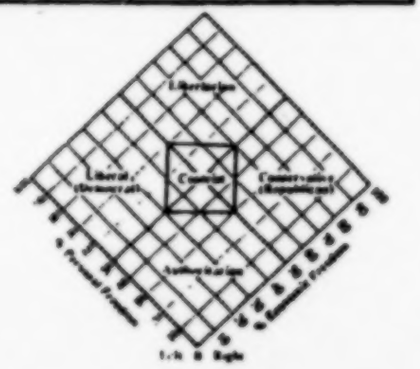
PART ONE: Personal Freedom

Whose decision should it be whether or not you:	My Decision	Not Sure	Gov't's Decision
Wear a seatbelt or helmet?			
Own a gun?			
Serve in the military?			
Help the needy?			
Pay for sex?			
Have an abortion?			
Use drugs?			
Send your child to public school?			
Use unapproved medicine?			
Buy a pornographic book?			
Count checkmarks			
Multiply by	x10	x5	x0
Add multiplied totals for Personal Freedom Score	____ + ____ = ____		

PART TWO: Economic Freedom

Whose decision should it be whether or not you:	My Decision	Not Sure	Gov't's Decision
Work for below minimum wage?			
Buy a foreign car?			
Play cards for money?			
Hire an unlicensed contractor?			
Deliver First Class Mail?			
Hire a minority worker?			
Invest in a risky business?			
Help a bankrupt corporation?			
Give money to a foreign country?			
Provide for your retirement			
Count checkmarks			
Multiply by	x10	x5	x0
Add multiplied totals for Economic Freedom Score	____ + ____ = ____		

Now plot your **Personal Freedom** Score on the left scale and your **Economic Freedom** Score on the right scale. The intersection of your scores reveals your political position.



MEMBERSHIP APPLICATION

I hereby certify that I do not believe in nor advocate the initiation of force as a means of achieving political or social goals.

Signature _____ Date _____

Name _____

Address _____

City _____

State _____ Zip _____

Home Phone _____

Work Phone _____

Occupation* _____

Employer* _____

(* FEC requires our asking)

I choose to set my dues at:

- ❑ $25 (Basic)
- ❑ $50 (Sustaining)
- ❑ $100
- ❑ $500 (Life Membership)

Plus:

- ❑ National LP Membership (add $20 to LPC dues)
- ❑ Additional Donation: $_____
- ❑ First Class Option for LPC Newsletter($5)

Total Enclosed $_____

Payment:

- ❑ Check to: Libertarian Party of California
- ❑ Visa ❑ MasterCard

Card # _____

Exp. Date _____

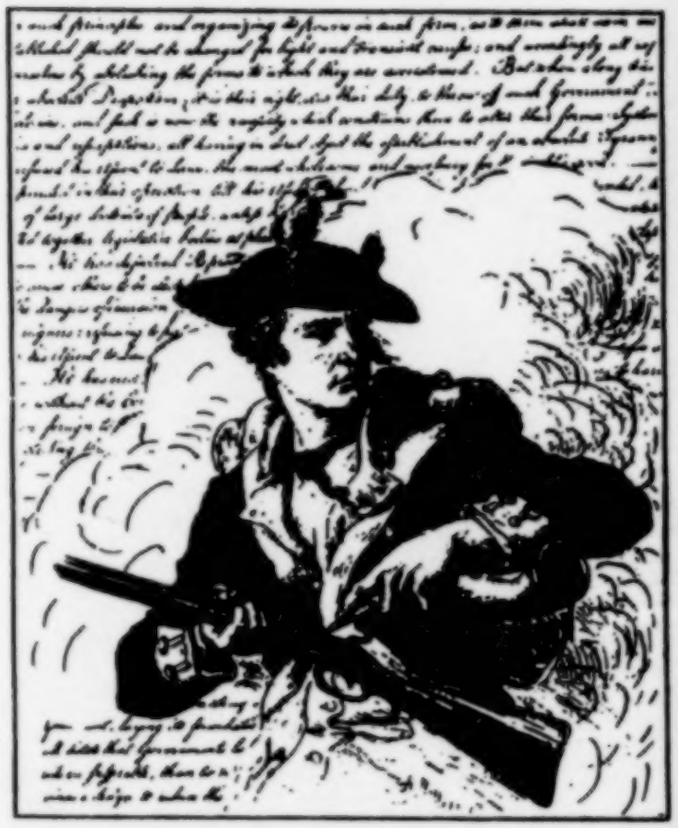
Name on card _____

Signature _____

Send to:

THE LIBERTARIAN PARTY OF CALIFORNIA
289 Greenhouse Mkp. #362
San Leandro CA 94579

THE LIBERTARIAN PARTY



THE ONLY POLITICAL PARTY DEFENDING THE SECOND AMENDMENT

PLAINTIFFS EXHIBIT 12

Prepared by
The Libertarian Party of Los Angeles County

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THE LIBERTARIAN PARTY DEFENDERS OF THE SECOND AMENDMENT

The Libertarian Party is the *only* political party in the United States that resolutely and uncompromisingly defends the Second Amendment to our nation's Constitution: unlike the politicians of the Democratic and Republican parties, the candidates of the Libertarian Party are absolutely firm on "the right of the people to keep and bear arms." No Libertarian in government will ever trade away that constitutional right.

THE DEMOCRATS & REPUBLICANS: TWO SIDES OF THE SAME COIN

It is becoming increasingly difficult to recognize the differences between the Democratic and Republican Parties, and their common position on the Second Amendment is an excellent example: once upon a time, most of the gun-grabbers belonged to the Democratic Party; today, they are just as likely to be found in the Republican Party.

In 1989, Republican President George Bush signed a bill banning the import of semi-automatic rifles into the United States. In 1990, Republican Governor Pete Wilson signed a bill outlawing the sale of most semi-automatic rifles in California. Recently, Ronald Reagan came out in support of the notorious Brady Bill, which even its authors admit would have virtually no effect upon crime. And conservative columnist George Will, "The Voice of the Republican Party", has actually advocated repealing the Second Amendment!

It should be obvious by now that the Republicans are just as willing as the Democrats to throw away your constitutional rights — rights that were bought with the blood of American patriots.

PROTECT YOUR RIGHTS: VOTE LIBERTARIAN

If you believe that "gun control" is immoral because it punishes peaceful citizens for the abuses of criminals, and if you realize that "gun control" has nothing to do with "crime control," then, if you *also* wish to vote for candidates that share your views, you have no alternative but to vote Libertarian. By voting Libertarian, you will take a vital step toward protecting your Second Amendment rights — as well as protecting the other rights guaranteed to you by our Constitution, all of which are under attack in some form or another by the "Demopublicans".

If you want to stop the Democrats and Republicans from revoking your constitutional rights, then register and vote Libertarian!

WHAT IS THE LIBERTARIAN PARTY?

The Libertarian Party is the fastest growing political party in our country. As dissatisfaction with contemporary politics rises at dramatic rates, more-and-more people are leaving the Democratic and Republican Parties and joining the Libertarian Party - the party of freedom.

WHAT DO LIBERTARIANS BELIEVE?

The principles that guide the Libertarian Party are the same that guided the founders of this country: free-market economics, a non-interventionist foreign policy, and the sovereign right of individuals to conduct their lives, non-violently, as they see fit.

Libertarians believe that people should be free to do as they choose, so long as they don't harm others; that individual freedom combined with personal responsibility for one's actions are the basis of a just society.

Libertarians believe that people working in a free-market economy will create innovations that will help feed the hungry, shelter the homeless, and cure the ill.

Libertarians believe that a government which taxes income from those who produce it and gives it to those who do not is immoral.

Libertarians believe that governments should be limited to protecting people from violence, fraud and aggression. Libertarians agree with Thomas Jefferson, who said "...that government governs best that governs least."

For more information about THE LIBERTARIAN PARTY, call 1-800-682-1776

PLAINTIFFS EXHIBIT 20

Peace and Freedom Party

1996 Platform

The Peace and Freedom Party of California, founded in 1967, is committed to democracy, ecology, feminism and socialism. We organize toward a world where cooperation replaces competition; a world where all people are well fed, clothed and housed; where all women and men have equal status; where all individuals may freely endeavor to fulfill their own talents and desires; a world of freedom and peace where every community retains its cultural integrity and lives with all others in harmony. We offer this summary of our shared vision:

Double the minimum wage, and index it to the cost of living.

Guarantee the right of all workers to organize and strike; forbid striker replacement.

Socially useful jobs for all at union pay levels.

Equal pay for equal work and for work of comparable worth.

A 30-hour work week with no cut in weekly pay; longer paid vacations.

Guaranteed dignified income for those who cannot work.

Tax the income and assets of the rich to meet human needs.

International trade agreements must guarantee protection of workers and the environment in all participating countries; abolish NAFTA and GATT.

End homelessness; abolish vagrancy laws; provide decent affordable housing for all.

Social ownership and democratic control of industry, financial institutions and natural resources.

The United States should take the initiative toward global disarmament by eliminating nuclear, chemical and biological weapons.

Withdraw U.S. troops and weapons from other countries. Reallocate the resulting "peace dividend" for social benefit.

PEACE AND FREEDOM PARTY

Abolish the CIA, NSA, AID and other agencies for interference in other countries internal affairs.

Convert from a military to a peace-oriented economy with jobs for displaced workers.

Self-determination for all nations and peoples of the world, including Puerto Rico and all U.S. territories.

Defend and extend liberties guaranteed in the Bill of Rights.

End discrimination based on race, sex, age, sexual orientation, or disability.

Defend affirmative action, guarantee full education and employment rights for all. Oppose Proposition 209.

Provide full free quality public education through university level. Teach the history of workers' struggles and labor's creation of society's wealth and progress.

Abolish the death penalty.

No prison labor for private profit.

Support the right of working people to keep and bear arms.

Democratic elections through proportional representation; full political, social and economic rights for resident non-citizens.

Honor treaties with Native American nations; recognize California's Native American nations. Defend and extend Native American rights and sovereignty.

Free high-quality health care for everyone, including birth control, abortion, pre-natal and childhood health care. No forced sterilizations.

Legalize marijuana, decriminalize drug use, and make substance abuse treatment freely available.

Give special attention to preventing epidemics of deadly diseases such as AIDS. Guarantee the rights of people living with AIDS.

Restore and protect clean air, water, land and ecosystems.

Promote conservation and develop solar and other renewable energy to replace nuclear power and fossils fuels.

Massive development of public transportation available free or at nominal fares.

Outlaw clearcutting and protect remaining old-growth forests.

PEACE and FREEDOM PARTY, P.O. Box 741270, Los Angeles CA 90004 (213) PFP-1998

The Propositions:
It's Do-It-Yourself Time

On November 5, you can vote for the interests of poor and working-class people and against the corporate rich. Voting on the propositions is the way to do that. Here they are, the short rap.

Vote YES November 5 on these Propositions:

YES on Proposition 207
Protect your right to have a lawyer

YES on Proposition 210
Raise the minimum wage to $5.75 per hour

YES on Proposition 211
Stop securities fraud, protect pension plans

YES on Proposition 214
Curb HMO abuse

YES on Proposition 215
Legalize medical use of marijuana

YES on Proposition 216
Improve medical care, protect patients

YES on Proposition 217
Don't let the rich dodge taxes

• • • • • • • • • • • • •

Vote NO November 5 on these Propositions

NO on Proposition 204
Bond issues make the rich richer

NO on Proposition 205
We don't need more jails or more bonds

NO on Proposition 209
Defeat the Lies of the California Civil Wrongs Initiative
defend the gains of the civil rights movement.

NO on Proposition 213
Limits right of poor people to sue for damages

NO on Proposition 218
No tax breaks for the wealthy, no property qualifications for voting

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Join the Peace and Freedom Party

The Peace and Freedom Party is working to build an independent people's movement that speaks and acts for itself, instead of relying on politicians beholden to corporate interests. We are an independent party committed to socialism, democracy, ecology, feminism and racial equality. We don't claim to have all the answers, nor to be a powerful force as yet, but we know who we are and where we want to go. We are working for a world in which all of us can have full claim on the social resources we all have helped to create, a world which can only come into being on the basis of common ownership amd democratic management of industry and natural resources. Join us to help in this work.

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The "Lesser Evil" — What's so "lesser" about it?

If you are a working class person, or a "minority", or a student, or a feminist, or just someone who cares about social justice, chances are you don't like the Democratic Party ... but you vote for them anyway.

Why? Because you've been told that they're a little bit better than the Republicans. Unfortunately, this is mostly a lie. As the following chart shows, your real choice is not between the Democrats and Republicans.

ISSUE	Democrats	Republicans	Peace & Freedom Party
U. S. Troops out of Middle East, Central America & Caribbean	*Oppose*	*Oppose*	Support
Free quality health care for all	*Oppose*	*Oppose*	Support
Free abortion on demand	*Oppose*	*Oppose*	Support
Decent, affordable housing for all	*Oppose*	*Oppose*	Support
Tax corporations and the wealthy	*Oppose*	*Oppose*	Support
End the boycotts of Cuba and Iraq	*Oppose*	*Oppose*	Support
Abolish the death penalty	*Oppose*	*Oppose*	Support
End corporate rape of the environment	*Oppose*	*Oppose*	Support
Worker control of workplaces	*Oppose*	*Oppose*	Support
Free university education for all	*Oppose*	*Oppose*	Support
Legalize marijuana	*Oppose*	*Oppose*	Support
Recognition of Palestinian state	*Oppose*	*Oppose*	Support
Unilateral nuclear disarmament	*Oppose*	*Oppose*	Support
Community control of police	*Oppose*	*Oppose*	Support
Shorter work week at same pay	*Oppose*	*Oppose*	Support

As you can see, your real choice is between the capitalist, corporate-oriented Republicrats and the socialist, human-oriented Peace & Freedom Party.

But, you say, Peace & Freedom doesn't have a chance. So say the capitalist media, which are controlled by the same elite that controls the dems and the repubs. But who marks *your* ballot: the media ... or you?

Register and Vote Peace & Freedom.

If you don't say that enough is enough, who will? If not now, when?

If you take what they give you ... you deserve what you get!

For more information, call or write:

Peace & Freedom Party

P. O. Box 24764, Oakland, California 94623

(510) 465-9414

PEACE AND FREEDOM PARTY

PLAINTIFFS EXHIBIT 21

the CLINTON record

- President Clinton has spent the post-Cold War PEACE DIVIDEND on maintaining the bloated military budget rather than on rebuilding America's deteriorating infrastructure.
- Upon taking office, Clinton ordered massive BOMBING of population centers in Iraq.
- Clinton embargoed Iran and continues the embargo of Cuba.
- He granted "most favored nation" status to China DESPITE its human rights violations.
- He bolstered the murderous military junta of Myanmar (Burma) with a "drug war" pact.
- Clinton APPLAUDED Turkey's cross-border slaughter of Kurds.
- While Russia was conducting an unpopular war against independent Chechnya, Clinton visited Yeltsin without making any criticism of the unneccesary brutality.
- Clinton feted Gen. Suharto of Indonesia despite military MASSACRES in East Timor.
- He turned his back on human suffering in Guatemala, Rwanda, Somalia and elsewhere.
- Clinton ESCALATED the nuclear stand-off against North Korea.
- Clinton refuses to respond to repeated calls for a global DISARMAMENT conference.
- He was the main proponent of anti-environment, anti-labor NAFTA and GATT treaties.
- He presided over the FBI's barbaric incineration of over 80 members of an isolated Texas church group who had NOT been convicted of any crime, including many children.
- Clinton pulled the rug out from under civil rights justice nominee Lani Guinier.
- Clinton dictated that military gays will be expelled if they even DISCUSS their sexuality.
- He FIRED Surgeon General Jocelyn Elders for doing her job too well.
- Bill and Hillary DERAILED the movement for universal health care in America.
- Clinton's nominations moved the Supreme Court toward even tighter corporate control.

This shameful reminder compiled by Casey Peters, 911 S. New Hampshire Ave., Los Angeles CA 90006.

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

DEFENDANT'S
EXHIBIT
A

[LOGO] 198

Elections, Open Primary, Initiative Statute.

Official Title and Summary Prepared by the Attorney General

ELECTIONS. OPEN PRIMARY. INITIATIVE STATUTE.

- Provides that all persons entitled to vote, including those not affiliated with any political party, shall have the right to vote at any election for any candidate regardless of the candidate's political affiliation.
- Provides for a single primary ballot on which, under the appropriate title for each office, the names and party affiliations of all candidates are placed randomly and not grouped by political party.
- Retains separate partisan ballot only for the selection of elective political party committee members by voters of each party.
- Requires Legislature to conform conflicting statutes.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- No direct fiscal impact on state government.
- Unknown, but probably minor, savings to counties statewide.

Analysis by the Legislative Analyst

Background

In general, California has three types of elections: primary, general, and special. Primary elections are held for both partisan offices, where candidates are identified on the ballot with a political party, and nonpartisan offices, where candidates are not identified with a political party.

In order to vote in primary elections for partisan offices, a voter must have identified a political party affiliation when registering to vote and can vote only for candidates of that party. Voters who have not identified a political party affiliation can not vote for candidates running for partisan office in primary elections. These voters, however, can vote for candidates for nonpartisan offices and on propositions.

For every primary election, the elections official in each county is required to prepare a partisan ballot for each political party and a nonpartisan ballot for voters who have not identified a political party affiliation.

Proposal

This measure allows all persons who are entitled to vote in primary elections, including those not affiliated with a political party, to vote for any candidate regardless of the candidate's political party affiliation. Thus, voters in primary elections would be allowed to vote for candidates across political party lines. Furthermore, the initiative provides that county elections officials prepare only

one ballot for all voters. The candidates for an office would be listed randomly on the ballot and not grouped by political party affiliation. The candidate of each political party who receives the most votes for a state elective office becomes the nominee of that party at the next general election.

These provisions do not apply to elections of political party committee members. In these elections, voters would be restricted to voting for candidates of their own political party affiliation.

Fiscal Effect

This measure would have no direct fiscal impact on the state. Counties could realize unknown, but probably minor savings statewide, primarily due to the preparation of fewer ballots.

For the text of Proposition 198 see page 61

Argument in Favor of Proposition 198

How many times have you heard someone say, "I vote for the person, not the party?" Yet, California's existing closed primary election system denies voters that choice.

California faces serious challenges: Our education system, economy, criminal justice system, tax policies, and natural resources are all in trouble.

Instead of facing up to these challenges, politicians from both major parties spend more time fighting with

each other and promoting narrow political agendas than they spend doing their jobs.

GIVE VOTERS A CHOICE.

California's closed primary election system limits voters' choices to candidates within their own party, and excludes 1.5 million independent voters from voting in primary elections at all. It favors the election of party hard-liners, contributes to legislative gridlock, and stacks the deck against more moderate problem-solvers.

The Open Primary will permit every voter to select the best candidate for each office, regardless of party affiliation.

INCREASE VOTER PARTICIPATION.

Voters are increasingly dissatisfied with the choices they face on election day – and participation is declining as a result.

The Open Primary will increase participation by giving voters a real choice and by forcing candidates to focus on issues, not just partisanship. It will also give independent voters – currently excluded in primaries – a chance to participate.

RESTORE HEALTH COMPETITION.

Party registration in most California legislative districts heavily favors one party or the other. In these so-called "safe" districts, the winner of the majority party's primary election is virtually guaranteed victory in the general election, regardless of how extreme the candidate's views.

In these districts, voters in the minority party have no real voice in the selection of their representative.

The Open Primary will encourage healthy competition in every district and force politicians to listen to all voters in their districts, not just those registered in their own party.

OTHER STATES GIVE VOTERS A CHOICE.

California has one of the most "closed" primary systems in the nation. Most other states recognize the increasing independence of voters by giving them a choice on election day.

Washington State and Alaska have open primaries very similar to the one proposed in California by this initiative. Special legislative elections in California are already conducted using a modified version of the Open Primary. The Open Primary system is proven, and it works.

WHO OPPOSES THE OPEN PRIMARY?

Hard-liners in both major political parties oppose the Open Primary because it will weaken their power and the power of special interest groups which support them.

HOW WOULD IT WORK?

Every primary election voter would receive a ballot containing the names of all candidates and their party affiliations. Voters would choose the candidate of their choice for each office, regardless of the candidate's party affiliation. The top vote-getters from each political party would then face each other in the November general election, as they do under the current system.

Non-partisan local offices and party committee offices would be unaffected by the Open Primary.

CALIFORNIA VOTERS DESERVE A CHOICE!
VOTE YES ON PROPOSITION 198.

BECKY MORGAN
Former State Senator

EUGENE C. LEE
Director; Institute of Governmental Studies, University of California, 1967-1988

DAN STANFORD
Chairman, California Fair Political Practices Commission, 1983-1986

Rebuttal to Argument in Favor of Proposition 198

How many times have you heard someone say, "There's not a dime's worth of difference between the parties"? If Proposition 198 passes, that phrase will become reality.

LIMITS VOTER CHOICES

Americans exercise their right of free association by joining the political party that best expresses their own ideas about government. Having made that choice, party members should be allowed to choose their nominees free from outside interference. Allowing members of one party a large voice in choosing another party's nominee – which Proposition 198 would do – is like letting UCLA's football team choose USC's head coach!

CURRENT SYSTEM ENSURES REAL CHOICES

Currently, political parties engage in a healthy debate about which candidate will lead them, giving voters a

real choice between eight different candidates from eight different parties, offering eight different visions.

WHO SUPPORTS PROPOSITION 198?

Proposition 198 is a cynical attempt by a few ambitious politicians who cannot win the support of their own political party. So now they want to change the rules to serve their own self-interest.

UNCONSTITUTIONAL

The United States Supreme Court has already ruled that political parties have the right to determine who votes in their primaries.

Thomas Jefferson advised against "the amalgamation of parties" and applauded distinct political parties with clear philosophical differences as "useful watchmen for the public".

Jefferson has a point. We strongly urge you to *VOTE NO ON PROPOSITION 198.*

BRUCE HERSCHENSOHN
Senior Fellow Claremont Institute

JOHN VAN DE KAMP
Former California Attorney General

ALISON DUNDES RENTELN
Acting Director – USC Unruh Institute of Politics

Argument Against Proposition 198

California primaries have one purpose for registered voters of each political party to vote to select their nominees for the November general election. Democrats can

nominate Democrats; Republicans can nominate Republicans, and that's the way it should remain.

After all, clubs and organizations don't let non-members vote in their elections and neither should California's voters do that in primaries.

Should Democrats be allowed to nominate Republican candidates for office? No! Should Republicans be allowed to nominate Democratic candidates for office? No!

Should Peace and Freedom Party members be allowed to choose the Republican candidate for office? Or should Libertarians choose the Democratic candidate for office? NO!

In primary elections, where parties choose their nominees, only Republicans should be allowed to vote for Republicans, Democrats for Democrats, etc. In the general election, where we choose our leaders, all voters can vote for any candidate, regardless of party.

When Republicans nominated Ronald Reagan in the primary, should Democrats have interfered? NO. Or when Democrats nominated John Kennedy in the primaries, should Republicans have interfered? NO.

Proposition 198 is a cynical attempt by a few self-serving politicians to twist the rules of California's electoral process to advance their own careers.

POLITICIANS AND SPECIAL INTERESTS WILL ABUSE THE PROCESS

Proposition 198 is an invitation to political mischief. This would be a dream come true for the politicians,

political consultants and special interests who will use specialized targeting to manipulate the political system to the benefit of their hand-picked candidates. California elections are already getting out of hand with way too much control by the special interests and political consultants with their massive checkbooks. Proposition 198 would just make the problem worse and take California even further down the wrong path.

PROPOSITION 198 IS UNCONSTITUTIONAL

The United States Supreme Court has already ruled a similar law unconstitutional because political parties should have the right to decide who votes in their own primaries. We don't need another badly drafted initiative clogging up our court system.

Vote no on attempts to undermine democracy. *VOTE NO ON PROPOSITION 198.*

JOHN S. HERRINGTON
Chairman, California Republican Party

BILL PRESS
Chair, California Democratic Party

Rebuttal to Argument Against Proposition 198

The party chairmen don't want you to have a choice unless it matches theirs. If all voters are allowed to participate, they fear they will lose their power, as will the hard-liners and special interest groups who support them.

YOUR *YES* VOTE ON PROPOSITION 198 –

- Makes elected officials more responsive to the voters, not the party chairmen. Unbalanced party registration in most legislative districts, combined with growing numbers of independent voters, mean millions of California voters are denied a choice under the current system.

- Encourages candidates to address issues, not just partisanship.

- Gives control back to voters, not special interest groups which use the existing closed primary system to maintain their control.

- Strengthens the parties by increasing voter participation and by electing candidates from both parties with broader bases of voter support. In states with open primaries, political parties have become stronger and healthier.

SUPREME COURT SUPPORTS BROADER PARTICIPATION

Contrary to claims by the party chairmen, the Supreme Court has strongly supported the right to expand participation in primary elections:

> "We note that the appellant's direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 states which have chosen to permit more substantial openness in their primary systems . . . "

> –U.S. Supreme Court
> Tashjian v. Republican Party of Connecticut
> (1986)

Vote YES on Proposition 198 to make political parties and elected officials more responsive to the majority of voters.

LUCY KILLEA
State Senator, 39th District (Independent)

HOUSTON FLOURNOY
State Controller, 1966-1974

DAN STANFORD
Chairman, California Fair Political Practices Commission, 1983-1986

Proposition 198: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure amends and adds sections to the Elections Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. This act shall be known and may be cited as the "Open Primary Act."

SEC. 2. Section 2001 is added to the Elections Code, to read:

2001. All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation.

SEC. 3. Section 2151 of the Elections Code is amended to read:

2151. At the time of registering and of transferring registration, each elector may declare the name of the political party with which he or she intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.

The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, ~~but no person shall be entitled to vote the ballot of any political party~~ *and that all properly registered voters may vote for their choice* at any primary election ~~unless he or she has stated the name of the party with which he or she intends to affiliate~~ *for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance*. The voter registration card shall include a listing of all qualified political parties.

~~No~~

Notwithstanding any provision to the contrary, no person shall be permitted to vote the ballot ~~of any party or for any delegates to the convention of any part~~ *for any elective political party central or district committee member* other than the party designated in his or her registration, except as provided by Section 2152.

SEC. 4. Section 13102 of the Elections Code is amended to read:

13102. (a) All voting shall be by ballot. There shall be provided, at each polling place, at each election at which public officers are to be voted for, ~~but~~ one form of ballot for all candidates for public office, ~~Except that, for partisan primary elections, one form of ballot shall be provided for each qualified political party as well as one form of nonpartisan ballot~~ *listing all candidates for public office*, in accordance with subdivision (b).

(b) At ~~partisan~~ *such* primary elections, each voter ~~not registered as intending to affiliate with any one of the political parties participating in the election~~ shall be furnished ~~only a nonpartisan~~ *an official primary* ballot. The ~~nonpartisan~~ *official primary* ballot shall contain ~~only~~ the names of all candidates for nonpartisan *and partisan* offices and measures to be voted for at the primary election. ~~Each voter registered as intending to affiliate with a political party participating in the election shall be furnished only a ballot of the political party with which he or she is registered and the nonpartisan ballot, both of which shall be printed together as one ballot in the form prescribed by Section 13207.~~

SEC. 5. Section 13203 of the Elections Code is amended to read:

13203. Across the top of the ballot shall be printed in heavy-faced gothic capital type not smaller than 30-point, the words "OFFICIAL BALLOT." However, if the ballot is no wider than a single column, the words "OFFICIAL BALLOT" may be as small as 24-point. Beneath this heading, in the case of ~~a partisan~~ *an official* primary election,

shall be printed in 18-point boldfaced gothic capital type ~~the official party designation or~~ the words ~~"NONPARTISAN~~ *"OFFICIAL PRIMARY* BALLOT" ~~as applicable~~. Beneath the heading line or lines, there shall be printed, in boldface type as large as the width of the ballot makes possible, the number of the congressional, Senate, and Assembly district, the name of the county in which the ballot is to be voted, and the date of the election.

SEC. 6. Section 13206 of the Elections Code is amended to read:

13206. (a) On the ~~partisan~~ ballot used in a direct primary election, immediately below the instructions to voters, there shall be a box one-half inch high enclosed by a heavy-ruled line the same as the borderline. This box shall be as long as there are columns for the ~~partisan~~ ballot and shall be set directly above these columns. Within the box shall be printed in 24-point boldfaced gothic capital type the words "Partisan Offices."

(b) The same style of box described in subdivision (a) shall also appear over the columns of the nonpartisan part of the ballot and within the box in the same style and point size of type shall be printed "Nonpartisan Offices."

(c) This section shall not apply to ballots for elective political party central or district committee members prepared in accordance with Section 13300.

SEC. 7. Section 13230 of the Elections Code is amended to read:

13230. (a) If the county elections official determines that, due to the number of candidates and measures that must be printed on the ballot, the ballot will be larger

than may be conveniently handled, the county elections official may provide that a ~~nonpartisan~~ ballot *for nonpartisan offices and measures* shall be given to each ~~partisan~~ voter, together with his or her ~~partisan~~ *official primary* ballot, ~~and that the material appearing under the heading "Nonpartisan Offices" on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots~~.

(b) ~~If the~~ *Notwithstanding Section 13300, the* county elections official ~~so provides;~~ *shall provide that* the procedure prescribed for the handling and canvassing of ballots shall be modified to the extent necessary to permit the use of two ballots by partisan voters. The county elections official may, in this case, order the second ballot to be printed on paper of a different tint, and assign to those ballots numbers higher than those assigned to the ballots ~~containing partisan offices~~ *for nonpartisan offices and measures.*

SEC. 8. Section 13300 of the Elections Code is amended to read:

13300. (a) By at least 29 days before the primary *election,* each county elections official shall prepare ~~separate~~ *identical* sample ballots for each ~~political party and a separate sample nonpartisan ballot, placing~~ *voter, provided however, that in the case of ballots involving elective political party central or district committee members, each county elections official shall prepare separate ballots for the sole use of persons registered with that party, as provided for in Section 2151. On the official identical primary ballots, each county elections official shall place* thereon in each case in the order provided in Chapter 2 (commencing with Section 13100), and under the appropriate title of each office, the names

and party affiliations of all candidates *organized randomly as provided in Section 13112 and not grouped by political party,* for whom nomination papers have been duly filed with him or her or have been certified to him or her by the Secretary of State to be voted for in his or her county at the primary election.

(b) The sample ~~ballot~~ *ballots* shall be identical to the official ballots, except as otherwise provided by law. The sample ballots shall be printed on paper of a different texture from the paper to be used for the official ballot.

(c) ~~One~~ *Except as provided in Section 13230, one* sample *official primary* ballot ~~of the party to which the voter belongs, as evidenced by his or her registration;~~ shall be mailed to each voter entitled to vote at the primary not more than 40 nor less than 10 days before the election. ~~A nonpartisan sample ballot shall be so mailed to each voter who is not registered as intending to affiliate with any of the parties participating in the primary election.~~

SEC. 9. Section 13301 of the Elections Code is amended to read:

13301. (a) At the time the county elections official prepares sample ballots for ~~each political party at~~ the presidential primary, he or she shall also prepare a list *with the name* of candidates for delegates for each political party. The names of the candidates for delegates of any political party shall be arranged upon the list of candidates for delegates of that party in parallel columns under their preference for President. The order of groups on the list shall be alphabetically according to the names of the persons they prefer appear upon the ballot. Each column shall be headed in boldface 10-point, gothic type

as follows: "The following delegates are pledged to ___." (The blank being filled in with the name of that candidate for presidential nominee for whom the members of the group have expressed a preference.) The names of the candidates for delegates shall be printed in eight-point, roman capital type.

(b) Copies of the list of candidates for delegates of each party shall be submitted by the county elections official to the chairman of the county central committee of that party, and the county elections official shall post a copy of each list in a conspicuous place in his or her office.

SEC. 10. Section 13302 of the Elections Code is amended to read:

13302. The county elections official shall forthwith submit the sample *official primary* ballot ~~of each political party~~ to the chairperson of the county central committee of ~~that~~ *each political* party, and shall mail a copy to each candidate for whom nomination papers have been filed in his or her office or whose name has been certified to him or her by the Secretary of State, to the post office address as given in the nomination paper or certification. The county elections official shall post a copy of ~~each~~ *the* sample ballot in a conspicuous place in his or her office.

SEC. 11. (a) No provision of this act may be changed except by a vote of the people.

(b) The Legislature shall amend or delete other provisions of law not encompassed by this act which conflict with the provisions herein in order to bring them into conformity with this act.

SEC. 12. If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

DEFENDANT'S
EXHIBIT
B

Los Angeles Times Poll
Study #374
March 26, 1996
Exit Poll: The California
Primary Election

The Times Poll interviewed 3,469 voters who cast ballots in the California primary election on March 26. The margin of sampling error for the entire sample is plus or minus 3 percentage points. For subgroups the error margin may vary.

* * *

M. How did you just vote on Prop 198 (Elections/Open Primary)?

	ALL	DEMS	REPS
VOTED FOR	60	60	58
VOTED AGAINST	40	40	42

* * *

Ballot Propositions (Among All Voters)

% OF ALL VOTERS WHO ARE		198 YES	198 NO
	SEX		
49	Male	58	42
51	Female	64	36
	AGE		
10	18-29	60	40
41	30-44	65	35
32	45-64	61	39
17	65 or over	52	48
	RACE/ETHNIC BACKGROUND		
81	White (Non-Hispanic)	60	40
19	Minorities	63	37
	EDUCATION		
20	High School graduate or less	63	37
28	Some college	66	34
26	College graduate	61	39
26	Post-graduate studies	54	46
	POLITICAL IDEOLOGY		
29	Liberal	58	42
32	Middle-of-the-road	68	32
27	Somewhat conservative	58	42
12	Very conservative	51	49
	PARTY SELF-IDENTIFICATION		
42	Democrat	61	39
17	Independent	69	31
41	Republican	57	43

	INCOME		
10	Less than $20,000	63	37
26	$20,000 to under $40,000	61	39
23	$40,000 to under $60,000	64	36
13	$60,000 to under $75,000	58	42
28	$75,000 or more	58	42
	RELIGION		
49	Protestant	61	39
24	Catholic	62	38
12	Other religions	62	38
15	Don't practice any religion	56	44

How the Poll Was Conducted

The Los Angeles Times Poll interviewed 3,469 voters who cast ballots in the California primary election as they exited 60 polling places across the state. The sample included 1,816 voters in the Republican Party primary and 1,564 voters in the Democratic Party primary. Precincts were chosen based on the pattern of turnout in past primary elections.

The survey was a self-administered, confidential questionnaire. The margin of sampling error is plus or minus 3 percentage points for all primary voters, for Republican primary voters, and for Democratic primary voters. For some subgroups the error margin may be somewhat higher. Fieldwork for this survey was conducted by Davis Research.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

DEFENDANT'S
EXHIBIT
E

The Consequences of Primary Election Laws in the American States

Expert Report

Prepared by:
Elisabeth R. Gerber
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June 3, 1997

I. Overview of the Project

In March of 1996, California voters passed Proposition 198, the Open Primary Law. Proposition 198 requires that California replace its current system of closed primaries for nominating candidates for state and federal office with an open or "blanket" primary system. This entails moving from a system in which participation in primary elections is limited to registered party members, to a system in which voters participate in the nominating primaries without regard to their party registration. Proponents of Proposition 198 argued that allowing registered voters to participate in whichever primary they choose, regardless of their party registration, would result in more competitive elections, increased voter participation, and more responsive elected representatives

(Secretary of State, 1996). Opponents argued that opening candidate nominations to nonpartisans and members of the other parties would result in raiding of the party's nomination process and a weakening of the parties (Secretary of State, 1996).

While we will only know the ultimate consequences of Proposition 198 after blanket primaries are put into place and several elections are held under the new system, it is instructive to analyze the experience other states have had with similar laws. Electoral laws, like other political institutions, create incentives for candidates, voters, and parties to engage in predictable patterns of behavior. These patterns of behavior result in predictable electoral outcomes. Certainly, there are also numerous other features of each state's unique political environment that also shape the electoral outcomes in that state. It is, however, reasonable to expect that there will be broad similarities between the electoral outcomes that result from states that have similar electoral laws and institutions.

This report summarizes research that analyzes the relationship between the primary system used in each of the American states and some of the outcomes produced by the electoral system. I find that in states that use blanket primaries, the congressional elections were more competitive by several measures, including the winning candidate's average vote share, number of uncontested races, partisan balance, average number of candidates in primary races (for Democrats only), and general election turnout. There were fewer minor party candidates in blanket primaries, and a far lower share of the general election vote went to minor party candidates, indicating

that the major parties in blanket primary systems are more permeable and are better able to incorporate diverse interests into their ranks. A higher percentage of the Members of Congress elected from blanket primary states are women, although a lower percentage of the Members of Congress elected from blanket primary states are members of racial or ethnic minority groups. The policy positions of Members of Congress elected from blanket primary states are also more moderate, both in an absolute sense and relative to the other party, and so are more reflective of the preferences of the mass of voters at the center of the ideological spectrum. Analysis of recent state legislative elections in California and Washington reveals many of the same patterns as well.

On the basis of these experiences in states with different primary election laws, I conclude that when the blanket primary is put into place in California, electoral outcomes in the state are likely to become more like those in states that already have blanket primaries. In other words, we can expect blanket primaries to make California elections more competitive, the parties more permeable, and the elected representatives more responsive to voters in the state. Since the data are limited in some ways that are discussed at length below, the point of this report is not to suggest that California elections will change in each and every one of the ways suggested by the analyses. Rather, the point is to construct a broad picture of some of the numerous electoral outcomes common among states with particular electoral laws. On the basis of the overall experience from other states, it is reasonable to conclude that on many of the dimensions illustrated in the report, election outcomes in California will become

more similar to those in states with open or blanket primaries under California's new primary election law. Any of these changes would improve the health and competitiveness of the two party system in California.

II. Description of the Data

The project analyzes data on primary system type and election outcomes drawn from numerous sources. This section summarizes the main sources of data.

A. Primary System Type

The US Constitution empowers individual states to determine the laws by which they conduct elections. To nominate candidates for congressional, state legislative, and state executive offices, all states use some form of primary elections.[1] These election laws vary in terms of restrictions on who can participate in the nomination process. The following are the main types of primary election laws currently used in the American states.

---

[1] Note that a state's laws regulating the nomination of congressional, state legislative, and state executive candidates often differs from its laws regulating presidential nominations. This research focuses strictly on the former, however, we would expect many of the patterns (i.e. competitiveness) to hold for presidential elections as well. Also, a state's laws for nominating minor party candidates often differ from its laws for nominating major party candidates.

1) Closed Primaries

Participation is limited to individuals who register as members of the parties a specified period in advance of the election. This system is currently used in sixteen states, including California prior to the implementation of Proposition 198.

2) Semi-Closed Primaries

Participation is limited to registered members of the parties and new voters and/or independents. Participation by members of other parties is prohibited. This system is currently used in eight states.

3) Open Primaries

Participation is open to registered voters, regardless of partisan affiliation. Members of any party, new voters, and independents select the primary in which they will participate on election day. However, an individual is restricted to participating in the primary of only one party at each election. This system is currently used in twenty-three states.

4) Blanket Primaries

Participation is open to registered voters, regardless of partisan affiliation. Voters choose between the entire set of candidates of each office, regardless of party, and may vote for candidates from different parties for each office. This is the system proposed in Proposition 198 and is currently used in two states (WA and AK).

5) Nonpartisan Primaries

Participation is open to registered voters, regardless of partisan affiliation. Voters select between all of the candidates for a given office, regardless of the candidates' party affiliation. The top two vote receivers, regardless of party, meet in a subsequent (runoff or general) election. This system is currently used in one state (LA).

In addition, some states also use a runoff procedure if no candidate receives a majority of the primary vote, in which the two candidates that receive the most votes in the primary meet in a runoff election.

Table 0 reports the type of primary election laws used to nominate congressional, state legislative, and state executive major party candidates in the American states as of 1990. Since 1990, only California has changed its nomination procedures.

Table 0. Primary Election Systems in the American States, 1990

State	*Primary System*	*State*	*Primary System*
AL	Open+Runoff	MT	Open
AK	Blanket	NE	Closed
AZ	Closed	NV	Closed
AR	Open+Runoff	NH	Closed
CA	Closed	NJ	Semi-Independ
CO	Closed	NM	Closed
CT	Semi-New	NY	Closed
DE	Closed	NC	Closed+Runoff
FL	Closed+Runoff	ND	Open
GA	Open+Runoff	OH	Open
HI	Open	OK	Semi-Both+Runoff

ID	Open	OR	Semi-New
IL	Open	PA	Closed
IN	Open	RI	Semi-Independ
IA	Open	SC	Open+Runoff
KS	Closed	SD	Closed
KY	Closed	TN	Open
LA	Nonpartison+Runoff	TX	Open+Runoff
ME	Semi-Independ	UT	Open
MD	Semi-New	VT	Open
MA	Semi-Independ	VA	Open
MI	Open	WA	Blanket
MN	Open	WV	Closed
MS	Open+Runoff	WI	Open
MO	Open	WY	Open

Source: Bott, 1990.

In the analyses that follow, I compare election results in states with closed primaries (no runoff) to those in states with open primaries (no runoff) and blanket primaries. While semi-closed primaries, nonpartisan primaries, and open and closed primaries with runoffs may also be interesting from an academic perspective, the ways those institutions shape the behavior of voters, parties, and other political actors are complex and are not well understood. More importantly, the consequences of those other election laws are not directly relevant to the question at hand: what will be the consequences of moving from closed primaries to blanket primaries in California.

B. Election Outcomes

The data on primary election systems described above allows me to group states according to similarities in their election laws. The data on election outcomes

described below allows me to assess the consequences of those election laws.

For reasons of data availability, the bulk of this report considers the outcomes of US congressional elections. In tables 1 through 9, I consider various aspects of the 1996 congressional elections, including general election vote margin of the winning candidates, percent of uncontested races, percent of Democrats and Republicans elected, general election turnout, number of major party candidates in the primaries, number of minor party candidates, vote share to minor party candidates, percent of races with at least one minor party candidate, and number of women and minorities elected. All of this information is available from the official election returns.[2]

Analyzing the elections returns from the 1996 congressional elections provides much information about the consequences of different primary election laws. Since the data are from just a single election, however, they may be subject to peculiarities of that one election and so the inferences that can be drawn about the likely consequences of Proposition 198 are more limited than if we were to analyze the outcomes of several elections. To offset this limitation, I also analyze comparable data on

[2] Please note that because of time constraints, I used the uncorrected returns as reported on election night by CBS, since they were available electronically (CBS 1997). These returns differ slightly from the corrected official returns. I did, however, conduct a detailed comparison of the official and unofficial returns. Based on that comparison, I verified that the unofficial returns were, in each case, within several hundred votes of the official returns. In addition, in each case, the unofficial returns indicated the correct winner.

state legislative elections in California and Washington for 1996. To the extent that election laws systematically shape electoral outcomes, we ought to observe similar patterns at the level of state legislative elections as well. For the most part, differences in the patterns observed in the state legislative election returns for California and Washington mirror differences in the congressional election returns for closed and blanket primary systems. There are some subtle differences between the state and congressional election returns, however, that appear to result from differences in other aspects of the electoral process in the two states, especially the existence of term limitations in California. I obtained these data from the Secretary of State Web Pages in each state (CA Secretary of State 1997, WA Secretary of State 1997).

I also analyze the policy positions of US Representatives elected between 1982 and 1990. Policy positions are measured as the representative's ADA score (CQ 1983-92). Each year, the ADA (Americans for Democratic Action) analyzes members' roll call votes and on the basis of these votes, assigns a "liberalism" score that ranges from 0 (most conservative) to 100 (most liberal). ADA scores are widely accepted within political science as a reliable measure of the liberal/conservative position of the member. Unfortunately, however, comparable data are not available for state legislators.

III. US Congressional Elections

A. Competitiveness

The first set of analyses consider the competitiveness of US Congressional elections that use blanket primaries,

open primaries without runoffs, and closed primaries. In the tables below, I also indicate the value for California separately for each of the measures of interest.

Table 1 below shows that *the average vote margin of the winning congressional candidate is smaller in blanket primary states than in closed primary states,* both in terms of the number of votes received and as a percentage of the total votes cast. Note that the ratio of the winning candidate's vote margin to total votes is greatest in California, indicating that congressional races in California were the least competitive by this measure.

Table 1. Winning Congressional Candidate's Average Vote Margin, 1996

Primary System	*Vote Margin*	*VM/TotalVote*
Blanket	35,240	.1797
Open	60,889	.2824
Closed	52,343	.3076
California	48,549	.3124

• • •

A second measure of competitiveness is how many of the races were uncontested. Table 2 below reports the percent of uncontested races in blanket primary states, open primary states, closed primary states, and California separately. We see that while the percent of uncontested races is small in all types of primary systems, *the greatest share of uncontested races are in closed primary states and the smallest share are in blanket primary states.* In fact, in 1996, there were no uncontested general election races in the blanket primary states. Less than 1 percent of the races in

open primary states were uncontested, while over 2% of the races in closed primary states were uncontested. In California, none of the fifty-two races were uncontested. This absence of uncontested races is contrary to the recent historical trend in California, however, and is likely due to the existence of term limitations on state legislators.[3] In previous years, there were numerous uncontested races in California.

Table 2. Percent of Uncontested Races, US Congressional Elections, 1996

Primary System	*% Uncontested Races*	*Number of Races*
Blanket	0	10
Open	0.79	126
Closed	2.13	141
California	0	52

• • •

A third measure of competitiveness is the extent that candidates from the two major parties hold an advantage under particular primary systems. Table 3 below shows that *blanket and open primary states produced nearly identical proportions of Democrats and Republicans, while closed primary states showed more partisan bias,* producing six percent more Republicans than Democrats. In California, the partisan bias was in the opposite direction, with seven

[3] Although California's term limitations do not apply directly to Members of Congress, they may indirectly affect the competitiveness of congressional races by producing a greater number of qualified candidates who are term limited out of the state Assembly or Senate.

percent more congressional Democrats elected than congressional Republicans.

Table 3. Percent Democrats and Republicans, US Congress, 1996

Primary System	*% Democrats*	*% Republicans*
Blanket	50.00	50.00
Open	49.21	51.00
Closed	46.81	53.19
California	53.85	46.15

• • •

A fourth measure of competitiveness is the degree of voter turnout in the general election. In 1996, *turnout was the highest in the blanket primary states, lower in the open primary states, and the lowest in the closed primary states.* Turnout was nearly twelve percentage points lower in California than in the blanket primary states.[4] These figures are reported in table 4 below.

Table 4. General Election Turnout, Percent of Voting Age Population, 1996

Primary System	*Turnout-General*
Blanket	55.81
Open	53.97
Closed	49.51
California	43.90

[4] Of course, many other factors besides primary system drive election outcomes; these may be especially important with respect to turnout. Still, the results presented here are suggestive of a general increase in competitiveness in blanket and open primaries.

* * *

A fifth and final measure of competitiveness is the number of candidates that participate in the primaries. Table 5 reports the number of Democratic and Republican party candidates in the 1996 primaries. Table 5 shows that *the average number of Democratic primary candidates per seat was highest in the blanket primary states, lower in the open primary states, and lowest in the closed primary states*. There were slightly more Democratic primary candidates per seat in California than the closed primary system average, although the number per seat in California was still much lower than in the open or blanket primary states. *For Republicans, however, competition as measured by the average number of candidates per seat was the lowest in the blanket primary states*. This finding is contrary to expectations and is likely due in part to the indirect effects of state legislative term limits on the availability of congressional candidates in California.

Table 5. Number of Major Party Candidates in Congressional Primaries, 1996, and Average Number of Major Party Primary Candidates per Seat

Primary System	*Number Democrats*	*Average Dem/Seat*	*Number Republicans*	*Average Rep/Seat*
Blanket	27	2.70	16	1.60
Open	246	1.95	251	1.99
Closed	200	1.42	250	1.77
California	86	1.65	100	1.92

* * *

To summarize, tables 1 through 5 indicate that **elections in blanket primary states are more competitive than elections in closed primary states,** and especially in California, as measured by the winning candidate's vote margin, percent of uncontested races, partisan balance, general election turnout, and number of Democratic primary election candidates.

B. Permeability

The second set of analyses consider the permeability of the major political parties in states that use blanket, open, and closed primaries. I assess permeability by examining the number and viability of minor party candidates. When the parties are very permeable, diverse interests are easily incorporated into them; when the parties are less permeable, diverse interests must find other mechanisms for representation such as minor parties. Thus, an indicator of permeability is the number of candidates that run as minor party candidates and the share of the vote they receive.

Table 6 reports the average number of minor party candidates in US congressional elections in 1996. In this and all subsequent analyses, unless indicated otherwise, I summarize the information from all minor parties and minor party candidates into a single measure. In many cases, however, the information on minor parties includes data from several candidates from different minor parties. Table 6 shows that *the average number of minor party candidates is much lower in blanket primary states than in open or closed primary states*. Open and closed primary states average 1.36 and 1.31 minor party candidates per general

election race, respectively, while blanket primary states average only 0.6 minor party candidates per race. Congressional elections in California average more than 2 minor party candidates per race.

Table 6. Average Number of Minor Party General Election Candidates, US Congressional Elections, 1996

Primary System	*Average Number MPC*	*Number of Races*
Blanket	.6000	10
Open	1.3571	126
Closed	1.3050	141
California	2.0385	52

* * *

Table 7 provides a second measure of the permeability of congressional elections: the average percent of the vote to minor party candidates. Consistent with the results reported for table 7 above, *minor party candidates in blanket primary states received a lower percentage of the total votes cast*, while minor party candidates in California received, on average, over 5 percent of the total votes cast.

Table 7. Average Percent of Vote to Minor Party Candidates, US Congressional Elections, 1996

Primary System	*Average Vote %*	*Number of Races*
Blanket	1.37	10
Open	3.23	126
Closed	3.22	141
California	5.07	52

* * *

A third measure of permeability is the percent of races with at least one minor party candidate. Table 8 reports the percent of 1996 US congressional races with at least one minor party candidate. By this measure as well, *parties in blanket primary states are the most permeable in the sense of having the fewest races with one or more minor party candidates.* While only 40% of the races in blanket primary states had at least one minor party candidate, fully 96% of those in California had at least one minor party candidate.

Table 8. Percent of Races With At Least One Minor Party Candidate, US Congressional Elections, 1996

Primary System	*% of Races*	*Number of Races*
Blanket	40.00	10
Open	79.37	126
Closed	70.92	141
California	96.15	52

* * *

To summarize, the data from 1996 US congressional elections illustrates that **in blanket primary states, fewer minor party candidates run and those that do run receive a lower the share of the vote than in open or closed primary states.**

C. Representation

The third set of analyses consider the representativeness of the Members of Congress elected under blanket, open, and closed primaries. By representativeness, I mean the

extent to which Members of Congress reflect both the demographic and ideological composition of their constituencies. One measure of representativeness is therefore the percent of women and minorities elected in states with each type of primary system. The closer the percent of candidates to their proportion in the population, the more reflective are elected representatives of their constituents.[5]

As the top section of table 9 shows, *the percent of women elected in blanket primary states is greater than the percent elected in closed primary states.* 20% of the Members of Congress elected in 1996 from blanket primary states were women, compared to only 9.52% in open primary states and 13.48% in closed primary states. Women were elected at a higher rate in California than in the other closed primary states, although the percentage, 19.23%, is still lower in California than in the blanket primary states of Washington and Alaska.

Table 9. Percent of Women and Minorities, US Congress, 1996

Primary System	*Women*
Blanket	20.00
Open	9.52
Closed	13.48
California	19.23

[5] This is but one measure of representation. Critics claim that what is important is not descriptive representation, i.e. reflecting demographic characteristics within the electorate, but rather substantive representation, i.e. reflecting the electorate's policy positions (see Swain 1993). I consider this second form of representation below.

	Nonwhites
Blanket	0
Open	9.52
Closed	13.48
California	19.23

* * *

Women fare better in blanket primary states than either open or closed primary states, indicating that the electoral system in blanket primary states allows for a closer representation of the state's population. However, the case is more complex for members of racial and ethnic minority groups.[6] In the racially diverse state of California, where nonwhites accounted for 44% of the adult population in 1990 and close to 50% by 1996, 19.23% of the state's congressional delegation was nonwhite. In the more racially homogenous states of Washington and Alaska, where nonwhites accounted for 13% and 27% of the adult population, respectively, no nonwhites were elected. Compared to the share of nonwhites in the population, however, it is unclear whether nonwhites are better represented in California or in the blanket primary states. In fact, in all primary systems – blanket, open, and closed – nonwhites continue to be greatly under-represented. Thus, while *fewer nonwhites were elected in blanket primary states than in open or closed primary states,* it is critical to

[6] For the purposes of this analysis, I use US Census categorizations and take nonwhites to include Blacks, Asians, Pacific Islanders, American Indians, Eskimos, Aleuts, ad Hispanics. Data on the gender and race of Members of Congress are obtained from member biographies on the US Congress Web pages (Congress 1997).

note that differences in state population characteristics may be largely responsible for these differences in the electoral success of nonwhite congressional candidates.

* * *

In addition to demographic characteristics, a second measure of representativeness is the relationship between a legislator's policy positions and those of his or her constituents. Decades of survey research in political science show that the great majority of American citizens place themselves at or near the center of the ideological spectrum. The closer a representative's policy position is to the ideological center, then, the more reflective he or she is to the policy position of the majority of voters.[7]

Table 10 reports the mean ADA scores of US Representatives between 1982 and 1990, broken down by party. As discussed above, ADA scores are a measure of the representative's ideology as indicated by his or her voting record. Higher ADA scores indicate a more liberal voting record, with 100 indicating the most liberal, while lower ADA scores indicate a more conservative voting record, with 0 indicating the most conservative.

I expect that if opening the nomination process leads to more moderate representatives, as the proponents suggest, Republicans elected under open and blanket primaries will have higher (more liberal) ADA scores than

[7] By moving towards the center, however, the representative moves further away from the preferences of voters located at one extreme. The point I am making here is an empirical point; whether moving towards the center is good or bad is a normative point.

Republicans elected under closed primaries, while Democrats elected under open and blanket primaries will have lower (more conservative) ADA scores than Democrats elected under closed primaries.[8] I find some evidence for this expected pattern. For Republicans, the mean ADA score for representatives elected under closed primaries is substantially lower (more conservative) than the mean ADA score for Republicans elected under blanket primaries. In other words, the more closed the primary system, the further the representative's voting record from the ideological center, as expected. Republicans from California are extremely conservative, with an average ADA score of only 8.53. For Democrats, the picture is somewhat more mixed. The mean ADA score for Democrats elected under closed primaries is greater (more liberal) than the mean ADA score for Democrats elected under open primaries, as expected. Democrats from California are extremely liberal, with an average ADA score of 91.13. However, the mean ADA score for Democrats elected under blanket primaries is more extreme (liberal) than the mean score for Democrats elected from more closed primary systems, contrary to the predictions of proponents of blanket primaries. Thus, *Republicans from blanket primary states are the closest to the mass of voters at the center of the ideological spectrum. Democrats from open primary states are closer to the center than Democrats from closed primary states, but Democrats from blanket primary states are in fact more liberal than their counterparts elected in closed primary states.*

[8] This logic is developed in great detail in Gerber and Morton 1997.

Table 10. Mean ADA Scores of US Representatives, Democrats and Republicans, 1982-1990

Primary System	*Democrats*	*Republicans*
Blanket	86.89	31.19
Open	79.39	15.11
Closed	83.72	16.88
California	91.13	8.53

* * *

Some of the deviation from the expected patterns in table 10 may be due to the fact that the data fail to account for differences across states in voter preferences. Certainly voters in Utah have, on average, different policy preferences than voters in Massachusetts. To the extent that these differences in voter preferences are correlated with the primary election system used in each state, differences in the positions of representatives elected under the different systems may simply reflect responses to different types of voters rather than the effects of primary election laws. Specifically, if voters in Washington and Alaska are, on average, more liberal than voters in California and the other closed primary states, then the liberal ADA scores of blanket primary system Democratic Members of Congress may result from their responsiveness to a more liberal constituency.

Table 11 controls for differences in voter preferences across states by computing the difference between the mean score of Democratic and Republican representatives elected from a given state. Table 11 shows that *the ideological positions of Democrats and Republicans elected from blanket primary states are the most convergent, while the positions*

of Democrats and Republicans elected from closed primary states are more divergent. The difference between the mean Democratic ADA score and the mean Republican ADA score within the California congressional delegation is enormous, separating Democrats and Republicans by 82.60 points.

Table 11. Difference between Mean Democratic ADA Score and Mean Republican ADA Score, State Congressional Delegations, 1982-1990

Primary System	*MeanDemADA-MeanRepADA*
Blanket	53.14
Open	61.95
Closed	60.89
California	82.60

* * *

To summarize, there is some evidence that the policy positions of Members of Congress elected in blanket primary states are closer to those of the majority of voters at the center of the ideological spectrum. When we control for differences in voter preferences across states, we see that **the policy positions of Democrats and Republicans from blanket primary states are much more convergent than the positions of Democrats and Republicans elected from closed primary states.**

IV. State Legislative Elections

Many of the same patterns that are evident in US Congressional elections emerge when we analyze state legislative elections as well. In the analyses below, I compare

the outcomes of the 1996 state legislative races in Washington, which uses blanket primaries, and California, which at the time used closed primaries.[9]

A. Permeability

The results regarding permeability are quite consistent with the results from US congressional elections. Table 12 below compares the average number of minor party candidates in Washington and California state legislative races. As with congressional races, there are, on average, fewer minor party candidates in the blanket primary system – Washington – and more minor party candidates in the closed primary system – California.

Table 12. Average Number of Minor Party Candidates, State Legislative Elections, WA and CA, 1996

State	*Average Number MPC*	*Number of Races*
Washington	0.07	123
California	0.81	100

[9] The analysis of state legislative elections is limited to measures of permeability and representativeness. In preliminary analysis, I compared the competitiveness of state legislative elections in California and Washington. Subsequently, however, I learned that Washington's term limitations had not yet taken effect in 1996, rendering the comparison invalid. The analysis of representativeness is limited to comparisons of women and nonwhites elected in California and Washington, since ADA scores are not available for state legislators. I exclude analyses of Alaska state legislative elections since the extremely small size of Alaska's state legislative districts are bound to make measures like competitiveness incomparable across the states.

* * *

The subsequent results regarding permeability of the parties as reflected in state legislative elections are also consistent with the results regarding permeability as reflected in congressional elections. We see in table 13 that minor party candidates receive a greater share of the vote in California's closed primary system, and as illustrated in table 14, are present in a much higher percentage of state legislative races.

Table 13. Average Percent of Vote to Minor Party Candidates, State Legislative Elections, WA and CA, 1996

State	*Average Vote %*	*Number of Races*
Washington	0.41	123
California	3.67	100

Table 14. Percent of Races With At Least One Minor Party Candidate, State Legislative Elections, WA and CA, 1996

State	*% of Races*	*Number of Races*
Washington	7.32	123
California	59.00	100

B. Representation

The results regarding the election of women and minorities to state legislative office mirror those for congressional elections as well. As with congressional elections, *the percent of women elected to state legislative office is larger in Washington, while the percent of nonwhites elected to state legislative office is larger in California.* 36.59% of the state legislators elected in Washington in 1996 were women,

while 25% of those elected in California in 1996 were women. Twenty percent of the state legislators elected in California in 1996 were nonwhite, while 3.25% of those elected in Washington in 1996 were nonwhite. Fourteen of the twenty minorities elected in California were Hispanic, reflecting the large Hispanic population. Again, the differences in the number of nonwhites elected in the two states reflect huge demographic differences in the underlying state populations. Still, in both states, all racial and ethnic minority groups were underrepresented in the set of state legislators elected in 1996.

Table 15. Percent of Women and Minorities, State Legislatures, WA and CA, 1996

State	*Women*
Washington	36.59
California	25.00
	Nonwhites
Washington	3.25
California	20.00

V. Summary and Conclusion

Analysis of recent congressional and state legislative elections reveals important and systematic differences between the electoral outcomes resulting from states that use different primary election systems to nominate candidates for office. The following patterns emerge: 1) elections are more competitive in blanket primary states; 2)

the parties are more permeable; and 3) the elected officials are more reflective of the majority of voter preferences in their states. On the basis of the experience from other states, it is reasonable to conclude that election outcomes in California will become more similar to those in states with open or blanket primaries under California's new primary election law. In my opinion, any or all of those changes would improve the health of California's two party electoral system.

/s/ Elizabeth R. Gerber 6/3/97
Elisabeth R. Gerber

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

DEFENDANT'S EXHIBIT G

STATEMENT OF: **Dr. David J. Olson**
Professor of Political Science
University of Washington – Seattle
Expert Witness on Washington State's
"Blanket Primary"

RE: **California Democratic Party, et al. v. Bill Jones, Secretary of State of California**

Until passage by public vote of Proposition 198 in California in 1996, only two states in the U.S. had adopted the "blanket primary" for conducting primary elections in the U.S. There are thirteen Western States, six of which employ the closed primary, while seven utilize the open or blanket primary (Benedict and Hrebenar, 1991, 107). Only Washington state (beginning in 1936) and Alaska (beginning in 1960) used the blanket primary prior to its adoption in 1996 by citizen initiative in California. The present statement addresses the uses and consequences of the blanket primary in the state with the longest experience with this unique form of the direct primary election.

Direct primary elections first appeared in the U.S. shortly after the turn of the current Century as an alternative method for political parties to select their nominees for the general election, replacing the more restrictive methods of the party convention and the party caucus.

The drive for adoption of the direct party was led by the Progressive Movement, which found fertile soil for its ideas among Western states (Hofstadter, 1955). The direct primary varies in form between the closed primary, on one hand, where voters choose party nominees from among candidates within the party within which the voter is registered, and the blanket primary, on the other hand, where voters do not have to declare a preference for one or another political party, and where they are free to choose nominees for each office among candidates of all parties. The open primary exhibits elements of both the closed and blanket primaries, where voters can cast votes in either party, but they cannot split their ballots between the parties in a given primary.

Opponents of the blanket primary argue that it intrudes on the associational rights of a party organization to choose candidates who will represent the platform stands of the party, and it allows candidates to run in the general election under the name of the party without being beholden to the party or its views. Blanket primary supporters respond that this nomination method removes the selection of nominees from the hands of a closed circle of party stalwarts, maximizes voters' freedom of choice over candidates, encourages voter turnout, and ensures that elected officials are representative of the people to be governed by forcing the parties to have a broad, cross-section of support from voters.

At the base of differences between opponents and supporters of the blanket primary lie two competing philosophies of democracy in the U.S. Advocates of strong parties see democracy best served by elected officials who adhere closely to party principles and platforms and

who abide by strong party discipline while holding office. Those less concerned with state guarantees of strong parties view democracy as best served by widely dispersed and active involvement among eligible voters in the selection of nominees who stand for election in general elections. In the end this is, of course, a question of political choice between competing philosophies about how the goal of genuine democratic self government is best attained by the alternative methods available for its realization.

In what follows, I present empirical evidence drawn from Washington state's six-decade experience with the blanket primary to address a series of issues that have been raised about the uses and consequences of this unique form of the direct primary. The discussion is informed by the findings of research conducted by political scientists, my own direct scholarly research results, and a quarter century of close observation and involvement in state politics in Washington. The format of presentation is to raise a series of six questions, and to provide answers to them.

QUESTION 1: Is There Evidence In Washington State of Cross-Over Voting, Or Raiding, or Phoney Candidates Due To the State's Blanket Primary System?

This three-part question is prompted, naturally enough, because the blanket primary allows voters to depart their normal party voting patterns to enter the opposition party column in primary elections supposedly to:

a.) "cross-over" and adversely influence the outcome of the opposition party's selection of its nominee;

b.) "raid" the opposition party's primary by strategically voting for the weakest or most vulnerable candidate in order to enhance one's own party's fortunes in the general election;

c.) support "phony" candidates in the opposition party's column whose names are the same as, or similar to, the leading opposition party candidate, or otherwise confuse the opposition party's selection of its nominee.

To address the first of these questions, cross-over voting does occur under the blanket primary system in Washington state. Because primary voters can choose for whom to vote for each office among candidates of all parties, ticket splitting is possible and it does occur in Washington state, whereas it is prohibited under either closed or open primary systems elsewhere. The blanket primary effectively gives voters the same choice structure in primary elections as they are afforded in general elections. With ample opportunity to move between the party columns in primaries, it is somewhat surprising that one-quarter to one-third of voters cast their primary votes within one party or the other. Kelley and Weir (1981, 4) observe that: "Party voters, it seems, are not in fact as willing to use the option to vote in more than one party's primary." Still, some voters do cross-over to vote in the opposite party's primary. The significant question to ask about these cross-over voters is whether they regularly and significantly alter or even influence the outcome of

primary elections. To this question, Kelley and Weir (1981, 2) answer: "The evidence indicates that crossover votes from the other party have not determined the outcome of most elections; in most cases, they have simply resulted in an even greater margin of victory for an already popular candidate." Thus, rather than altering primary election outcomes, the cross-over voters reinforce outcomes that otherwise would have occurred, but by larger margins.

The potential for raiding under the blanket primary generates wide media attention and spawns electioneering lore that is simply unwarranted by actual experience. Technically defined, raiding would occur where partisan voters of party X cross-over in sufficient numbers to help select the weakest or most vulnerable candidate in party Y. The requirements for this form of electoral subterfuge are: 1) the absence of a meaningful primary contest in party X; 2) provisions of sufficient information to identify the weaker and most vulnerable potential opponent in party Y; 3) concerted action by a large enough bloc of voters in party X to influence the outcome in the primary of party Y; and 4) the abandonment of traditional party loyalties by partisan voters to enter the opponent's primary.

In the experience of Washington state, these requirements are simply too demanding and have not been fulfilled in actual practice. Avery (1973, 238) reviews nearly three decades of use of the blanket primary and concludes: "there is only one instance where there is any evidence that this (raiding) happened – in a Seattle mayoralty primary election – and it may not have been the case there." Kelley and Weir (1981, 2) similarly find:

"There has been little evidence in the state of Washington of 'raiding' by regulars of the opposition party in order to secure the nomination of a candidate felt to be a weaker opponent." While supposed raiding may make good newspaper copy and provide colorful campaign lore, it is simply not borne out in the experience of Washington state's blanket primary.

The filing of phony candidates in the primary election of the opposing party in order to undermine a popular opponent is a form of supposed electoral subterfuge associated with the blanket primary that has in common with the phenomenon of raiding a consuming interest by media commentators and a colorful place in campaign reminiscences. As an actual consequence of the blanket primary, the phony candidate phenomenon suffers three problems. First, achieving voter attraction to the phony candidate places a set of requirements on party strategists that are even greater than those enumerated above for the raiding phenomenon. Second, there is no valid empirical evidence confirming the filing of phony candidates. Third, there is nothing distinctive about the blanket primary that would encourage filing phony candidates. The strategy is equally available in all direct primaries, whether of the closed, open or blanket varieties.

QUESTION 2: What Is The State of The Two Party System In Washington; How Is The Health of a Party Defined and Measured; and Where Do The Political Parties In Washington Fall Within That Spectrum?

Political parties are organizations that run candidates for office with the goal of winning elections. The major

parties in Washington are the Republican and Democratic parties, but a number of other parties run candidates from time to time.

Washington exhibits a wide-open and freewheeling style in its politics. The inherited legacy is a "lusty, gutsy" politics with pronounced strains of populism and radicalism (Bone, 1985, 7). The state's radicalism includes ideologies of both the left and the right which are deeply embedded in the state's populist political practices. Tendencies toward radical and populist politics are reified in the use of the initiative, referendum, and recall. Washington voters tend to be highly independent and its political parties are commonly regarded as not strong (although, see below).

What parts of these political attributes and behaviors can be attributed to the influence of the blanket primary? This question involves a tricky "chicken and egg" issue of causality: does the blanket primary create weaknesses in the political parties; or, did weak parties create the blanket primary? The direction of the flow of causality is as important as it is complex; most likely the causal influences pass in both directions. In order to sort out these complexities, it is helpful to inventory the state of health in Washington's two party system under the blanket primary.

A foremost goal of political parties is to win elections. The Republican and Democratic parties have thrived in their quest for capturing public offices on a more or less even basis. By any criterion of measurement, Washington state is an evenly divided, two party competitive system. The Democratic and Republican parties

were remarkably evenly matched in electoral outcomes, according to Hrebenar and Benedict (1991, 142), throughout the seventies and in the period from 1982 to 1986, more so than ***any*** of the other dozen mountain and Pacific states of the West. This finding is consistent with Ranney's (1976) earlier research on the 1962-1973 time period, which placed Washington as one of only six states in the West in the two party competitive category. And, Walker (1992, 45) concludes that: "Washington has been ranked as a highly competitive state. Over the years the difference between the winner and loser in gubernatorial races – whether Democrat or Republican – is slight." There is ample evidence from multiple sources that Washington state's two party system is highly competitive and evenly balanced in electoral outcomes. It lacks the more common pattern in the West where one or the other party dominates electoral outcomes, and thereby creates one very strong and one very weak party. Two party competitive status thus may be viewed as a central indicator of the well being of a party system in regularly offering voters a viable choice among candidates for elective office. The competitiveness of the parties directly contributes to Washington's relatively high levels of voter turnout. In fact, during the 1980s, Washington ranked 15th nationally in voter turnout (Nice, 1992, 73). To the extent that the blanket primary results in producing candidates whose appeal is to the median voter (see Kelley and Weir, 1981), it can be seen as contributing to and sustaining the highly competitive party system in Washington state.

Beyond two party competitiveness, measured by state-wide and legislative party electoral viability, there

are other dimensions along which the well being of parties can be assessed. One is the degree of party discipline within the legislature. Party discipline tends to be promoted within two party competitive states, like Washington, whereas one party dominant state legislatures tend to break up into party factionalism. Most Western state legislatures are part time, poorly paid, poorly staffed, with nonprofessional legislators. It is because these settings provide few incentives or motivations for party discipline or party cohesiveness that Sorauf and Beck (1988, 410) find the most disciplined and cohesive legislative parties in urban, northern states. Yet they also suggest that parties can dominate the legislative process through the power of the party caucuses. Jewel and Olson (1988, 237) identify the party caucus in Washington as contributing significantly to party cohesion. Thus, if one points to a single factor as governing legislative voting behavior in Washington, it is the party of the legislator, not constituency, special interest group, or other influences. According to research done by LeBlanc (1969, 36), moreover, the rate of party voting among Western state legislatures ranged from a low of 17 percent in California to a high of 50 percent in Washington state. Parties also play a dominant, near exclusive, role in determining the organization of the Washington legislature, its hierarchy of leadership, committee chairs and membership, and the adoption of working rules and procedures. This has led Nice (1992, 84) to conclude: "a legislator's party affiliation remains the single most defining characteristic throughout his or her legislative service."

At the city and county levels of party organization among the 50 states, Gibson (1985, 154-155) finds that

local Democratic party organizations are the strongest in Hawaii, Idaho, and Washington.

Finally, consideration can be given to the dimension of the parties' strength within the electorate. Like elsewhere in the U.S., party loyalties in the Washington electorate are considerably weaker than they were in the 1950s. This secular trend has seen the rise of PACs, candidate-oriented campaigns, and the rise of special interest groups all as partial replacement for the former dominant role parties played in the electorate. As Nice (1992, 71) suggests, "The distribution of party loyalties in Washington generally resembles national patterns," and (1992, 72) "the evidence clearly indicates that each of the major parties has a substantial group of supporters." The most recent survey of voter identification with parties reveals that in Washington state there is close parity between Republican and Democratic party identifiers, and that those calling themselves independent in Washington are nearly identical with those who similarly label themselves nationally (Nice, 1992, 71-73).

From this survey we may conclude that, while parties in Washington are generally perceived to be weak, in their complex political involvements they demonstrate remarkable areas of strength. Washington parties are among, if not *the* most, highly competitive in the Western states, due at lest in part to the blanket primary. The party caucuses in the state legislature create strong party cohesion and the single most important influence in the conduct of state legislative activities are the parties legislators belong to. At the city and county levels, the Democratic party is among the strongest in the country. Finally, the parties in the electorate command equal shares of

partisan identifiers and independents in Washington state approximate those who call themselves independents nationally. This inventory helps to place the health of the party system in Washington in perspective, where the parties can legitimately claim a central role in conducting the public's business. If there is a fear that the parties in Washington are too weak, it is not shared by citizens of the state. As Mullen and Pierce (1985, 66) report: "65 percent of the Washington state public thinks that political parties have 'too much power'."

QUESTION 3: Do The Parties Engage In And Are They Effective In Conducting Party Activities Such As Raising Funds, Promoting And Recruiting Candidates For The Party, Getting Out The Vote? Do The Major Parties Put Forth Strong Candidates That Represent The Core Views Of That Party? Do The Major Parties Engage In Meaningful Contests?

Conclusions about the strength or weakness of political parties depends upon whether one looks at how competitively effective they are in the outcome of elections or at the organizational strength of parties. In answer to question 2 above, the discussion largely addressed the former, where Washington parties were found to be highly competitive, and will not be repeated here.

Party strength organizationally directs our attention to party fund raising, recruitment and promotion of candidates, mobilizing the vote, fielding strong partisan candidates and providing meaningful contests. It is also the

case that the two parties may show important organizational differences along these indicators of strength. Thus Walker (1992, 45) suggests, after reviewing organizational variables like those involved in this question: "based on indicators such as these, the Democrats in Washington state would be classified as organizationally weak while the Republican party is the ninth strongest in the country." Thus the Republican party may be one of the strongest organizationally in the country at the state level, while, as we showed in discussing question 2, the Democratic party is particularly strong in Washington at the city and county levels (Gibson, 1985, 154-155). Nice (1992, 69) offers a similar assessment of how strong the Republican party is, but ranks the Democratic party's strength above its counterparts elsewhere in the states:

> "evidence from the late 1970s indicates that the Washington Republican organization was one of the 10 strongest state party organizations in the country and that the Democratic state organization was only slightly weaker than the national average for both parties and somewhat stronger than the average state Democratic party organization. Washington's local party organizations are stronger than their counterparts in most other states, as measured by party budgets and staffing, services provided to candidates, and issue leadership."

From this we may conclude that researchers have found the Washington state Republican party to be in the top ten nationally in terms of organizational strength, while the Democratic party is left strong organizationally, it is competitive with Democratic parties elsewhere in the 50

states and shows particular strengths at the city and county level, where its organizational base rests.

It is in the particulars of party activities where party strength or weakness gains currency. Campaigns for office at all levels of the U.S. federal system, and among all its states, have witnessed enormous increases in expenditures. The political parties remain an important source of campaign finances, generally in the U.S. and in Washington state. In the 1990 Washington state legislative campaigns, for example, the fifth largest contributor was the Senate Republican Campaign Committee and the seventh largest contributor was the Senate Democratic Caucus Committee (Seeberger, 1997, 202). State, county, legislative district and House caucus committees of both parties remained active in raising and distributing campaign funds as well. Incumbents consistently spend more than their challengers in contested elections. The margin of financial advantage in Washington, however, may not be as large as in other states. In the 1990 Washington state elections, incumbents held an expenditure advantage over challengers, but in the state Senate races that advantage was just slightly under 1.5 to 1, while in state House races it was less than 2 to 1 (Washington Public Disclosure Commission, 1991, 36). This can be contrasted to the 1990 California state elections, where incumbents outspent challengers by an 8 to 1 margin (Wall Street Journal, 1991, A8).

The relationship of party fund raising and contributions may have less to do with any secondary influences of the blanket primary than the direct constraints imposed by campaign finance reform measures. For example, in 1992 Washington voters approved Initiative

134, a proposal aimed at limiting campaign contributions. It limited a caucus or political party from contributing more than $.50 per registered voter in a candidate's jurisdiction and limited county central committee and legislative district committee contributions to no more than $.25 per registered voter (Seeberger, 1997, 165). The campaign finance reform initiative also prohibits transfers of money between candidates, prohibits fund raising during legislative sessions, and restricts taxpayer-funded mailings by state officeholders. it may be argued that initiated measures like I-134 place considerably greater constraints on party fund raising and contributions than any derivative effects of the blanket primary.

The single most important agency for recruiting and promoting candidates for public office in Washington state are the political parties. Party activity can be seen clearly in the 1994 elections, when the Republican party recruited energetic and highly partisan candidates, resulting in the largest switch in any state's Congressional delegation during the "Revolution of '94", and at the state legislative level an 18.4 percent turnover in the state Senate and an amazing 40.8 percent in the state House. The results clearly reflected the concerted effort of the Republican party to identify attractive candidates and to promote their campaigns with sufficient funding (Seeberger, 1997, 122). Similar recruitment of women candidates can be seen in activities of both parties in the 1990s, where the Republican party saw an increase over twenty years from 3 percent of its legislators to 28 percent, while the Democratic party registered the remarkable gain from 5 percent of its state legislators being women to a solid majority of 55 percent in 1995 (Seeberger, 1997, 142). In

sum, parties in Washington remain active in identifying, recruiting and promoting candidates for state-wide office as well as for the state legislature.

The Republican party in Washington has perfected the "get out the vote" campaign. It carefully identifies its core base of strength, targets key supporters through direct mail campaigns, makes phone calls to known supporters on election day, and provides transportation to the polling places. The Democratic party in Washington has "tagged along" in mirroring the leadership role the Republican party has played in this regard. The easy availability of absentee voting, including provision for permanently being registered as an absentee voter, has led the parties, especially the Republican party, to identify, inform and mobilize voters who cast the absentee franchise. In part due to the "get out the vote" activities of the two parties, Washington state ranks 15th in voter turnout nationally (Nice, 1992, 73).

The 1994 Congressional and state legislative elections illustrate how the parties in Washington continue to recruit strong candidates who reflect the core views of the party. More generally, Nice (1992, 73) argues that, once elected, "The evidence reveals that Washington's Democrats in Congress are clearly more liberal than the state's Republicans, both in the house and the senate." Washington state's Congressional delegates behave like their partisan counterparts from elsewhere around the country: "Washington's congressional delegations are ideologically similar to most members of their own parties on a national basis. Republicans vote similarly to other Republicans in the house and Washington Democrats vote as most other northern Democrats do." (Nice, 1992, 73) A

similar conclusion is reached by Mullen and Pierce (1985, 72) who suggest that: "even though the public does not view party as particularly important, the party affiliation of the winning congressional candidate does make a substantial difference." Similar differences are observable at the state legislative level, where Republican legislators tend to be significantly more conservative on taxation issues, land use control, regulatory reform, and social issues more generally. It may then be said that the two parties hold issue positions at substantial variance with each other, they recruit candidates reflective of those issue positions, and, once elected, partisan members of legislative bodies significantly reflect the different positions represented by their parties.

Lastly, here, do the parties engage in meaningful contests? Perhaps the best answer to the question is given by citizen turnout rates at the polls. Washington state ranks 15th in voter turnout, seeming to indicate that voters at least perceive meaningfulness in the contests offered to them. It cannot be ignored, at this point, that the highly competitive two party system extant in Washington state induces the parties to make the contests for elective office meaningful if they aspire to achieving their primary goal – winning elections.

QUESTION 4: What Is The Impact, If Any, Of The Open Primary System On Minority Voters In Washington?

The racial minority population of Washington state stands at 11.5 percent, including Latinos, Asians and Pacific Islanders, African Americans, and Native Americans, in descending order of size. Current Governor Gary

Locke, a Chinese-American, represents the first Asian elected governor among the continental states. A total of 7 Asians have served in the state legislature and 11 African Americans have similarly served. Seeberger (1997, 125) reports the most recent trends: "In the 1995096 Legislature, there were two Asian American members and two African American members, meaning 1.34 percent each of the total membership of the Legislature. That was down from 1993-94 when Asian Americans made up almost 3 percent of legislators and African Americans were at 2 percent." All of the racial minority legislators came from districts whose composition consisted of racial minorities being in a minority. There is not now, nor has there ever been, a racial majority state legislative district in Washington state.

There is no evidence that the blanket primary works to the electoral disadvantage of racial minority voters or candidates. There is also no evidence that the blanket primary works to the advantage of racial minority voters or candidates. If a racial minority candidate appears in the primary of one of the parties, voters from the opposite party and independents have the freedom to enter the racial minority candidate's primary and vote for her; but by the same logic, in a racially polarized election, voters from the opposite party who oppose the racial minority candidate and like minded independents can enter the racial minority candidate's primary and vote against her. There is no research evidence of either of these logical possibilities occurring in Washington state elections. Thus, the blanket primary appears to be a neutral instrument when it comes to favoring or disfavoring racial minority voters and candidates.

QUESTION 5: Are There Studies Or Empirical Evidence On The Operation Of The Blanket Primary In Washington?

This question nicely asks for my bibliographic listing of source materials that, along with my own research and my personal observations and involvements with Washington state politics, provide the background for all of the foregoing materials. The bibliographic listing consists of:

BIBLIOGRAPHY AND SOURCE MATERIALS

Avery, Mary W. *Government of Washington State*. Seattle: University of Washington Press (revised ed.) 1973.

Benedict, Robert C. and Ronald J. Hrebenar. "Political Parties, Elections and Campaigns, I: The Legal and Political Setting," in Clive S. Thomas, ed., *Politics and Public Policy in the Contemporary American West*. Albuquerque: University of New Mexico Press, 1991. Pp. 103-130.

Bone, Hugh A. "The Political Setting," in Thor Swanson, William F. Mullen, John C. Pierce, and Charles H. Sheldon, eds., *Political Life in Washington*. Pullman: Washington State University Press, 1985, Pp. 1-17.

Gibson, James L. "Whither the Local Parties?" *American Journal of Political Science* 29 (February 1985), Pp. 150-161.

Hrebenar, Ronald J. and Robert C. Benedict. "Political Parties, Elections and Campaigns, II: Evaluation and Trends," in Clive S. Thomas (ed.) *Politics And Public Policy in the Contemporary American West*. Albuquerque: University of New Mexico Press, 1991, Pp. 131-159.

Hofstadter, Richard. *The Age of Reform: From Bryan to F.D.R.* New York: Alfred A. Knopf, 1955.

Jewel, Malcolm E. and David M. Olson, *Political Parties and Elections in American States*, 3rd ed. Chicago: The Dorsey Press, 1988.

Kelley, Richard C. and Sara Jane Weir, "Unwrapping The Blanket Primary," *Washington Public Policy Notes*. 9 (Summer 1981) 3.

LeBlanc, Hugh, "Voting in State Senates: Party and Constituency Influences," *Midwest Journal of Political Science*. 13 (February 1969).

Mullen, William F. and John C. Pierce, "Political Parties," in Thor Swanson, William F. Mullen, John C. Pierce, and Charles Sheldon, eds. *Political Life in Washington*. Pullman: Washington State University Press, 1985, Pp. 55-73.

Nice David C., "Political Parties in Washington," in David C. Nice, John C. Pierce, and Charles H. Sheldon, eds. *Government and Politics in the Evergreen State*. Pullman: Washington State University Press, 1992, Pp. 65-77.

Ranney, Austin, "Parties in State Politics," in Herbert Jacob and Kenneth Vines, eds., *Politics In The American States*. 3rd ed. Boston: Little, Brown, 1976.

Seeberger, Edward D. *Sine Die*. Seattle: University of Washington Press, 1997.

Sorauf, Frank and Paul Beck, *Party Politics in America*. 6th ed. Glenview: Scott, Foresman, 1988.

Walker, Elizabeth, "Interest Groups in Washington State," in David C. Nice, John C. Pierce, and Charles H. Sheldon, eds., *Government and Politics in the Evergreen State*. Pullman: Washington State University Press, 1992, Pp. 41-63.

Wall Street Journal, The, (June 19, 1991, P. A8).

Washington Public Disclosure Commission, *1990 Election Financing Fact Book*. Olympia: Washington State Department of Printing, 1994.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

DEFENDANT'S EXHIBIT H

Analysis of Crossover and Strategic Voting

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1 Overview

We undertake the analysis of primary elections from 1980 through 1996 using both academic individual level survey data, media exit-polls, and aggregate election returns on a county by county basis. We come to the following conclusions:

1. **there is very little crossover voting in general in United States primaries;**
2. **the difference in the amount of crossover voting between states with open primaries and closed primaries is not substantivelv large;**
3. **the amount of strategic behavior on the part of voters is extremely small.**

* * *

3 Basis of this Analysis

This analysis is based on publicly available survey data, and aggregate election returns from several states.

The individual level analysis is based on the following surveys that are available from the Inter-university Consortium for Political and Social Research in Ann Arbor.

- 1992 Voter Research and Surveys Presidential Primary Exit Polls
- 1988 CBS/New York Times Super Tuesday Primary Election Exit Polls
- 1988 CBS/New York Times Primary Election Exit Polls
- 1988 American National Election Studies Super Tuesday Study
- 1984 CBS/New York Times Primary Election Exit Polls
- 1980 American National Election Study

We analyze this data to determine the likelihood of voters to engage in: crossover voting, strategic voting of a positive kind, and raiding.

First, we consider the amount of crossover voting likely to happen under an open primary. This is of course the first question; if there is no crossing-over, then the adoption of an open primary has no impact.

We also examine whether there is more or less crossover voting in an open primary than a closed primary. Crossover voting in a closed primary may sound like a logical inconsistency: but many voters in closed Democratic primaries will profess to identify with the Republican party when asked, and will vote for the Republican presidential candidate in the general election. The same is true for many voters in closed Republican primaries.

Second, we consider why these voters are crossing over. There are three reasons to crossover:

- Sincere Voting: A Republican voter could feel that a Democratic candidate is the best candidate available in the entire field, and thus crossover to vote Democratic. Such a voter is sincerely trying to insure that his or her most preferred candidate has the opportunity to contest the general election.
- Second-Best Vote: A Republican voter could feel that the Republican primary is a foregone conclusion; and rather than waste their vote on a Republican candidate, they could try to insure that the Democratic candidate is the best available candidate from the lot. This would give the voter some 'insurance' in the event of a Democratic win in the general election.
- Raiding: A Republican voter could feel that the most important thing is to elect *any* Republican; and think that the best way to do this is to insure that the Democrats nominate the candidate that would be weakest in the general election. Such a voter would vote in the Democratic primary for the Democratic candidate perceived to be weakest in the general election. Such behavior presupposes a complex chain of behavioral assumptions, and an unlikely set of election day realities. First, the voter must choose to try to influence the election by electing the most likely *loser* for the 'opposing' side; rather than try to elect the most likely *winner* from the home-team. Second, the voter must have information (or beliefs) about the relative chances of success of each candidate in the

primary in a general election that is at least 4 or 5 months away.

4 Complexity of Strategic Voting

Before proceeding to the empirical analysis of the incidence of strategic voting, we lay out the reasons why it is unlikely to observe strategic voting in the context of United States primary elections.

4.1 Second-Best Strategic Voting

This requires information about the likely outcome in at least one primary. Such information might be available. For instance, in United States presidential elections, a sitting incumbent president is generally regarded as almost a sure thing in his own party's primary. Thus for instance, a Democratic voter in 1996 might have felt that Bill Clinton was certain to be the party's nominee. But uncertain of the general election outcome between Clinton and the Republican nominee, the voter might have voted in the Republican primary for Steve Forbes because the voter preferred Forbes to all other Republican candidates.

4.2 Strategic Raiding

Such behavior presupposes a complex chain of behavioral assumptions, and an unlikely set of election day realities. First, the voter must choose to try to influence the election by electing the most likely *loser* for the 'opposing' side; rather than try to elect the most likely *winner* from the home-team. Second, the voter must have information

(or beliefs) about the relative chances of success of each candidate running in the primary in a general election that is at least 4 or 5 months away. Such information is simply not going to be available. Consider recent electoral history. In 1992 even *after* sewing up the Democratic nomination, Bill Clinton was given little chances in the polls of winning the general election. During the primary it became common wisdom that Clinton had so much personal baggage that he would be a sure loser in a general election. So any Republican voter attempting to strategically 'raid' the Democratic primary might have been tempted to vote for Bill Clinton. But obviously this would not have secured the objective.

One reliable piece of evidence we have that voters *cannot* know in advance the likelihood of a given candidate winning the general election is the documented change in perceptions over time, and polls over the course of a campaign, of a given candidate's chances. The Iowa Presidential Election market offers us a reliable indicator of the informed public's perceptions of the chances of any candidate wining nomination and the general election.[2] That the prices for any candidate move over time is an indication that the public does not know who the most likely winner is. For instance, between January and March of 1996 the price of a Bob Dole share

[2] The Iowa Presidential Election Market is a real money futures market run by the College of Business Administration of the University of Iowa. The market is open to traders from anywhere in the world, access is provided over the world wide web. Participants in the market buy financial contracts, the value of which are determined by the presidential election outcome.

for the Republican Primary fluctuated between 63 cents and 50 cents. There is even more uncertainty in the public's mind as to the winner of the presidential election. The general public has no reason not to take the latest published pole as the best predictor of the general election result. Yet the polls show tremendous variability.

4.3 Elections Considered

The likelihood of crossover voting depends upon the available candidates. In the extreme case, few voters are likely to crossover to vote in a primary with only one candidate. Rather we expect crossover voting to depend upon two things: the choices available for each party, and the relative competitiveness of each party's primary. Thus to establish the likelihood of crossover voting it is important to consider crossover voting under many different election scenarios.

We analyze the following cases:

- The 1992 presidential primary: Here the republican race was not considered competitive, with George Bush running as an incumbent and only challenged by Pat Buchanan; the Democratic race was extremely competitive for many states and offered many choices.
- The 1988 presidential primary: here the Republican race was briefly competitive and the Democratic race was competitive.
- The 1984 presidential race: this offered a competitive Democratic primary, and a completely uncompetitive Republican primary.

This was an excellent opportunity for Republican voters to crossover.

- The 1980 presidential primary: this race offered interesting primaries in both parties; giving voters of both parties the temptation to crossover.

5 Cross Over Voting

5.1 Definition: Open vs. Closed Primaries

Most primaries in the United States are commonly classified in one of two categories: open or closed.

> In most states where voters declare their party preference when they register to vote, 'closed' primaries are held; only voters registered with a particular party are allowed to participate in that party's primary. Some states have modified this system and allow citizens who register as independent or state no party preference when they register to select the party ballot of their choice. Selecting a party ballot usually puts these voters on the registration rolls as members of the party. In states without party registration, 'open' primaries are held. Voters either choose a party ballot before they enter the polling booth or in states where the Republican and Democratic primary races are on the same ballot, voters may cast a ballot in either party primary once in the polling booth. (McGillivray, 1993: vii)

We used McGillivray's classification of states in determining whether they had open or closed primaries. Thus a closed primary is one in which only voters registered as

party members are eligible to cast ballots. An open primary is one in which voters are not required to be registered as party members to cast ballots.

5.2 Definition: Crossover Voting

We consider a crossover voter to be when a Democratic voter votes in a Republican primary, or when a Republican voter votes in a Democratic primary. We do not consider votes in either primary by independent voters to be crossover votes. We feel that any definition of crossover voting that counts independents is not appropriate for American politics, where an increasing number of voters now claim to be independents. The American National Election Studies has been asking respondents "Generally speaking, do you consider yourself a Republican, a Democrat, an Independent, or what?" since 1952. In the 1990s the percentage of respondents claiming to be Independent has been over 35%.

5.3 Measurement of Crossover Voting

To determine the difference in the amount of crossover voting between open and closed primaries we must first find a way to measure the amount of crossover voting in closed primaries. This might seem like a contradiction: by definition the members of the Democratic party are not able to vote in a closed Republican primary, and members of the Republican party are not able to vote in a closed Democratic party. However, party "membership" is not really a useful concept in this case. Since people become party "members" by the act of registering to vote, not by

some voluntary act independent of voting, party membership is not really what we want to know. In a closed party we could observe that there are no "crossover" voters simply because the criteria we use to assign someone to a party is observationally equivalent to their already having crossed over. For instance, consider a state with closed primaries; and an electorate that has not previously registered with either party, but is 50% Republican and 50% Democratic. If in a given election 1 out of 5 Democratic voters chooses to vote in the Republican primary we would register them as Republicans; and record that the electorate was 60% Republican and 40% Democratic – with zero crossover voting. But this simply isn't right.

So, what to do? Using aggregate data, we could observe the voting behavior over time of individuals in a state to see how Democratic or how Republican they are. But with available survey data, there is an easier and more direct method. A standard question on both academic surveys and media exit polls of voters is designed to determine which, if either, party the voter identifies with. For instance, in 1992 Voter Research and Surveys asked voters leaving the primary polling place "No matter how you voted today, do you usually think of yourself as a: 1) Strong Democrat. 2) Not strong Democrat, 3) Strong Republican, 4) Not strong Republican, 5) independent, 6) something else?"

If we look at the data for the 15 states with **closed primaries** where VRS was in the field, we see that 3% of voters in closed Democratic primaries claim to be Republican identifiers, and 1.9% of voters in closed Republican

primaries claim to be Democratic identifiers.[3] This data is presented in Table 2.

[TABLE 2 OMITTED IN PRINTING]

Now for comparison purposes, lets look at the proportion of voters in **open primaries** claiming to identify with the opposite party (Table 3). This is a clean measure of the amount of crossover voting. Turning again to the VRS survey for 1992, we have data for 12 states with open primaries. 5.3% of voters in open Democratic primaries reported to be Republican identifiers; and 4.2% of voters in Republican primaries claimed to be Democratic identifiers.

[TABLE 3 OMITTED IN PRINTING]

Now examining individual states we see that the range of crossover voting was not very high (Tables 4 and 5. In the **closed primary** states the most crossover voting in the Democratic primary was in Louisiana, 7%.[4] The least was Kansas with 1.4%. On the Republican side Connecticut had the greatest amount of crossover voting, only 2.9%; and Oklahoma had the least, only 0.5%. In California, 2.0% of voters in the Democratic primary claimed to be Republican identifiers, and 1.4% of voters in the Republican primary claimed to be Democratic identifiers.

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[3] The Republican count is based on only 14 states.

[4] Louisiana is well known for having a variant of a blanket primary for choosing most of its elected officials. However, it uses a standard closed primary to choose its delegates to the national convention.

Looking at individual states with **open primaries** we can get some idea as to the variance in crossover voting that different strategic situations can present (Table 6. Even with open primaries, the highest reported amount of crossover voting in open Democratic primaries is only 7.8%; in Mississippi 7.8% of voters in the Democratic primary claim to identify with the Republican party. And in open Republican primaries the highest level of Democratic identifiers is in Georgia, where 8.7% of voters claim to identify with the Republican party.

Of course to test further for the possibility of increased crossover voting under different strategic or contextual possibilities it makes sense to look at different election years. Thus for 1988 we examined both CBS/NY-Times exit poll data, and National Election Studies surveys.

In the 6 states we have CBS/NY-Times exit poll data for that held **closed primaries,** we again had little crossover voting. Only 2.8% of voters in closed Democratic primaries claimed to be Republican identifiers, and 3.0% of voters in closed Republican primaries claimed to be Democratic identifiers. This is shown in Table 7.

Demonstrating that context can matter, we saw significantly more crossover voting in **open primaries** in 1988 than 1992. In the 4 open primaries we have CBS/NY-Times exit polls for 10.4% of voters in open Democratic primaries claimed to be Republican identifiers. In the 1 open Republican primary we have such exit poll data for 6.8% of voters claimed to be Democratic identifiers (Table 8).

We see relatively little variance in crossover voting across the states with **closed primaries**. There is large variance across the 4 states with **open primaries**: the amount of crossover voting ranges from 2.9% (Ohio) to 20.5% (Indiana). This is shown in Tables 9 and 10.

In 1984 we analyzed the CBS/New York Times exit poll data for Democratic primaries in five states with **open primaries**: Alabama, Georgia, Illinois, Ohio, and Texas. This was a perfect year to find high amounts of strategic crossover voting by Republicans as the Republican primary was of no interest (Ronald Reagan was unchallenged). Other than local races, there was no reason to vote in the Republican primary. Yet in our five states, only 276 of 6213 voters in Democratic primaries surveyed (4.4%) claimed to be Republican identifiers. The highest crossover rate was in Georgia (7.2%), the lowest in Texas (1.6%). The results are given in Tables 11 and 12.

In the three **closed primary** states we looked at for comparison purposes in 1984 (California, Pennsylvania, and New York), only 142 of 6352 voters surveyed (2.2%) in the Democratic primary classified themselves as Republican identifiers (Tables 12 and 13. So, the difference in crossover voting between open and closed primaries, even in a year that we expect to lead to large amounts of strategic voting, is only 2.2%.

6 How Many Raiders?

While the amount of crossover voting necessarily puts an upper bound on the amount of strategic behavior by voters, we still want to know the motivation of the crossover voters. The most pernicious attempt at strategic

voting would be for voters to attempt to 'interfere' and 'sabotage' the primary of the other party by crossing over and voting in the opposing party's primary in an attempt to give the other party the *weakest* general election nominee. We looked for raiders in the 1988 Super Tuesday primaries. This is an appropriate election to search for raiders because the requisite circumstances for raiding were present: the Republican primary was largely a foregone conclusion in the minds of most voters (George Bush was looking unbeatable), and the Democratic primary offered a large selection of candidates – some of whom were probably not likely to be strong candidates in a general election.

To determine if a crossover voter is attempting to act as a raider we need to know if the voter is intentionally voting for a candidate that they perceive to be a loser in the general election. Here are the requirements a voter had to meet for us to classify them as a raider:

1. They had to crossover and vote in the primary of the party that they did *not* identify with.

2. There had to be a candidate available in the primary they voted in whom they did *not* vote for, and:

   (a) Who they preferred to the candidate they did vote for, and

   (b) Who they felt had a better chance of winning the general election than the candidate they voted for.

3. They had to want the party they identified with to win the general election.

We thus need quite a lot of information about a voter's preferences regarding the candidates, and the voter's beliefs about the relative likelihood of candidates winning the general election. The National Election Study's 1988 "Super Tuesday Study" conducted by the Center for Political Studies of the Institute for Social Research, was designed to elicit this type of information from voters. The study consisted both of a pre-primary questionairre, and a post-primary interview that was administered to 1688 respondents, 719 of those respondents reported voting in a primary.

We determined whether a voter crossed over by comparing their self-reported partisan identification to the primary they voted in. A voter who reported voting the Republican primary but claimed to identify with the Democratic primary was classified as a crossover voter; as was a voter who reported voting in the Democratic primary but claimed to identify with the Republican primary. To determine whether these crossover voters had a more preferred candidate available to them, we utilized their responses to the "Feeling Thermometer" questions the NES asked. The precise question asked was:

> Now let's talk about your feelings toward the people you know something about. I'll read the names of a person and I will ask you to rate that person on a thermometer that runs from 0 to 100 degrees. Ratings between 50 and 100 degrees mean that you feel favorable and warm toward that person. Ratings between 0 and 50 degrees mean that you don't feel too favorable and are cool toward that person. You may use any number from 0 to 100 to tell me how favorable

> or unfavorable your feelings are for each person. If you don't feel particularly warm or cold toward the person, you would rate the person at the 50 degree mark.
>
> The first person is XXXXXXXXXXX. How would you rate (him/her) using this thermometer?

If a respondent listed one of the candidates in the primary they voted in as having a *higher* thermometer score than the candidate they voted *for*, we considered them to be potential raiders.

Raiding also requires the voter to consciously vote for a candidate they expect to have little chance in the general election. Again, the National Election Study explicitly elicits the respondents' opinion on this. Respondents were asked:

> Now, thinking about general election to be held this November we'd like you to tell us about some of the candidate's chances of winning the presidency in 1988. As before, we will use a scale that runs from 0 to 100, where 0 represents no chance of winning the presidency, 50 represents an even chance, and 100 represents certain victory.

Thus, we can compare the respondents' explicit evaluation of the chances of the candidate he or she voted for with the chances of each of the other candidates available in the same primary. If the respondent votes for a candidate that they both "feel less warmly" about, and think has a lower chance of winning the general election, then another available candidate – then we cannot but think that their intention is to raid, not to insure that each primary will produce a candidate they view favorably.

We provide results in Table 16. There, we see that the results are as follows: 97 of the 719 voters (13.5%) reported crossing over. However, of the 719 primary voters, only 557 of them were willing to assign feeling thermometer ratings to the candidate they voted for. 65 of these 557 voters crossed over. 35 of the 291 (12.0%) voters in open primaries (12.0%) crossed over, and 30 of the 266 voters (11.3%) in closed primaries crossed over. Thus as we have consistently seen, the crossover rate is low. Of the 65 crossover voters, 9 reported motivations consistent with raiding! Of these, 4 were in open primaries, and 5 were in closed primaries.

We broke the crossover voters down further by motivation. We defined **true supporters** as people who crossed over to vote for the candidate who they regarded as the best option *in either primary* according to their feeling thermometer rankings. We defined **second best voters** as people who crossed over to vote for the *best* candidate available in the primary they voted in, though their first choice was available in their own primary: these were people who presumably thought that their own primary was a foregone conclusion; but wanted their most preferred candidate from the other primary available as an alternative in the general election should their own party's candidate lose in November. These are people looking for insurance. We defined **positive strategic** voters as voters who crossed over to vote for a candidate presumably because they felt their own primary was a foregone conclusion, and while they did not vote for their most preferred alternative available in the primary they were voting in, there was no preferred alternative *with as high a perceived chance of winning the primary*. Thus again,

these were voters who we felt were trying to get some insurance for the general election.

Of the 35 voters who crossed over in open primaries, 13 were **true supporters** – voters crossing over because the grass was greener on the other side and they found their favorite candidate there. 14 of these 35 crossover voters met our conditions for being **second best voters**: they were voting for their preferred candidate in the primary they were voting in. Of the 8 remaining voters, 3 were **positive strategic**, 4 were **raiders**, and 1 did not fit any of our categories.

Of the 30 voters who crossed over in closed primaries, 10 were **true supporters**. 11 were **second best**, 3 were **positive strategic**, 5 were **raiders**, and 1 was not classified in any of our categories.

7 Conclusion of Individual Analysis

We have demonstrated that open primaries do not lead to a substantively large increase in crossover voting over closed primaries. And we have argued that the existing literature on voter behavior suggests that any crossover voting that occurs will be motivated by voters' desire to vote for their first-choice candidate, or to a lesser extent, to avoid wasting their vote. Voters will simply not have the information necessary to engage in raiding behavior in primaries. We find that our empirical analysis of the 1988 Super Tuesday primary provides overwhelming evidence to support this claim. By carefully examining the voters' evaluations of the available candidates, and the voters' perceptions of the candidates' chances of winning both the primary and general election, we have been able

to demonstrate that fewer than 2% of voters in the primary engaged in raiding behavior.

It is our view that the blanket primary will not lead to large amounts of strategic behavior by voters. The possibility of strategic behavior in a primary is significantly different than in multi-candidate general elections.

* * *

8.3 What has the aggregated electoral data demonstrated?

To conclude, we have shown that there was not a great deal of crossover voting in the aggregated data we examined using 1992, 1994, and 1996 county-by-county electoral returns from Ohio and Washington, across a number of different primary elections. In general, we found in the ecological estimates that crossover voting averaged 12% for the thirteen races we examined.

This analysis of the ecological data, then, leads us to have much more confidence in our hypothesis that the incidence of crossover voting in open and blanket primaries is not very great. The evidence presented here cross-validates our empirical results using the exit poll data earlier in this report. Here, we do estimate that the extent of crossover voting in open and blanket primaries is slightly greater than we found using the exit poll data from a number of recent presidential primaries across many states. This could be the result of one of two phenomenon. On one hand, our ecological analysis might be overestimating the incidence of crossover voting. If that is the case, **then the amount of crossover voting in these races is much lower**. On the other hand, if our

ecological analysis is correct but the exit poll analysis is incorrect, **then the amount of crossover voting in these races is correct.** But in either case, we are very confident, on the basis of two fundamentally different types of empirical evidence and statistical approaches, that the amount of crossover voting in open and blanket primaries is no higher than the level we have estimated using the ecological data. Hence, the amount of crossover voting in open and blanket primaries is relatively slight.

Additionally, the ecological results in this section of our report help to provide answers to two other important questions. The first concerns the incidence of crossover voting in non-presidential primary elections. We have shown above (and just discussed in the previous paragraph) that we find little support for the argument that the incidence of crossover voting is higher in sub-presidential primaries. Also, using the ecological data, we have found that the incidence of crossover voting in visible state-wide races is not any greater or lesser than for less prominent state-wide races.

Last, we have provided some evidence here that crossover voting in blanket primaries is not dramatically higher than in other types of open primary systems. Washington's blanket primary process is very similar to what might be instituted in California; using the ecological data we have provided evidence that the blanket primary in Washington does not produce levels of crossover voting which are much different from levels of crossover voting in other types of open primaries (for example, in Ohio).

9 Conclusion

In this report we have presented an extensive array of data analysis: spanning a variety of primary election years, different states, various types of primary election institutions, different types of data and different types of statistical analysis. Our purpose has been to determine what the extent of crossover voting is in states with open and blanket primaries. Additionally, we have also probed into the data further to understand what motivates individual voters to crossover and vote for candidates of the opposing party – in particular, whether these voters are doing so for strategic reasons.

We began this report by discussing the relevant academic literature on strategic voting in political behavior and on crossover voting in primary elections. There we noted that in this literature the estimated incidence of strategic political behavior, of crossover voting, and of primary election "raiding", is relatively slight. Additionally, we briefly mentioned some of the problems which we have observed with the empirical analysis in the literature.

We then produced our own extensive analysis of both the publicly available survey data and of some aggregated electoral statistics from Ohio and Washington. Using different statistical approaches to analyzing these different databases, we have developed three conclusions about crossover voting in open and blanket primaries and about the potential for strategic voter behavior in open and blanket primaries:

1. there is very littler crossover voting in general in primary elections in the United States;

2. the difference in the amount of crossover voting between states with open primaries and closed primaries is not substantively large;

3. the amount of strategic behavior on the part of voters in primary elections is small.

We believe that these conclusions shed light on what will happen when California voters encounter the new open primary system in the future. There is no reason to believe that the amount of crossover voting will be any different in California than in the many cases we have examined. Also, we believe that our results show that most of the crossover voters will be motivated to cast ballots for opposing party primary candidates simple because they prefer those candidates to the candidates offered in their own party's primary, or they view their own party primary as a foregone conclusion and want the best possible set of candidates to choose from in the general election. We believe that few California primary election voters will engage pernicious raiding in the opposing party's primary.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
[Caption Omitted In Printing]

DEFENDANT'S EXHIBIT I

T. Anthony Quinn
2743 Marty Way
Sacramento, Calif. 95818

MEMORANDUM ON THE IMPACT OF PROPOSITION 198

By. T. Anthony Quinn PhD

The purpose of this memorandum is to look at Proposition 198, the measure creating an open "blanket" primary for California, from a number of different perspectives.

Section One provides an analysis of the vote on this measure at the March 1996 primary. Using exit polls and turnout figures it is possible to show that large majorities of both Democrats and Republicans voted for this measure.

Section Two examines the history of "anti-partyism" in California to show that the vote in favor of Proposition 198 conforms with the long held preference of California voters for limiting the power of political parties and for expanding the voter franchise. This section also discusses the impact of direct democracy, the initiative process, on the political parties.

Section Three examines the phenomenon of disenfranchised voters who are left out of the political process because they are not of the dominant political party in safe legislative districts. This section includes a numerical analysis of the safe districts showing how many voters

are denied participation in the selection of their legislator and member of congress as a result of the closed primary. It is clear that one of the goals of the electorate in enacting Proposition 198 was to extend the franchise to these voters.

Sections Four and Five examine the direct impact of the open primary, first on the two party system and second on the political parties in California. Section Four shows that it is possible to have vigorous two party competition, as Washington State has, within the context of the open primary, which Washington has used for many years. Section Five lists the functions and activities of the parties in California, none of which are burdened by Proposition 198.

NOTE: All election numbers for California are taken from the official statements of the vote and reports of registration of the California Secretary of State.

Section One

VOTING ANALYSIS – PROPOSITION 198

Proposition 198 was enacted by California voters at the 1996 primary by the following vote:

Voting YES:	3,340,642 (59.51 percent)
Voting NO:	2,273,064 (40.49 percent)

Proposition 198 was the only one of the five initiatives on the 1996 primary ballot to pass.

* * *

Vote by Party:

Proposition 198 was endorsed by a large majority of both Democratic and Republican voters. The Los Angeles Times exit poll found that 61 percent of Democrats, 57 percent of Republicans, and 69 percent of independents voted for Proposition 198. It passed by a wide margin among all voter groups, except self defined "very conservative" voters. It passed handily among white and minority voters. The exit poll found that 60 percent of whites favored the measure and 63 percent of minorities.

The exit poll results are very close to the results of the actual vote. As is usually the case, more people registered with the major parties voted in the primary than independent or minor party voters. Following is the official canvass turnout for the 1996 primary as reported by the Secretary of State:

Turnout By Party Registration

Democratic:	2,822,460	(46.41 percent)
Republican:	2,660,943	(43.75 percent)
American Independent:	58,597	(.96 percent)
Green:	29,690	(.49 percent)
Libertarian:	21,746	(.36 percent)
Natural Law:	9,847	(.16 percent)
Peace & Freedom:	10,462	(.17 percent)
Reform:	40,199	(.66 percent)
Non-Partisan Voters:	427,895	(7.04 percent)

Expressed another way, 90.16 percent of voters in the 1996 primary belonged to one of the major parties; 2.80

percent belonged to one of the six minor parties, 7.04 percent are not registered with any political party.

Apportioning the Los Angeles Times exit poll findings to actual turnout, the results are as follows:

Democrats voting YES:	1,721,701
Democrats voting NO:	1,100,759
Republicans voting YES:	1,516,738
Republicans voting NO:	1,144,205

620,942 more Democrats voted YES on Proposition 198 than voted NO, and 372, 533 more Republicans voted YES on Proposition 198 than voted NO. This occurred despite ballot arguments encouraging a NO vote on Proposition 198 signed by both major party chairs. It is readily apparent that party *registrants* refused to follow the advice of party *leaders* on the issue of the open primary as embodied in Proposition 198.

Regional Voting Patterns:

Proposition 198 did best in politically marginal areas and did worst in highly partisan areas.

It carried every county in California and 75 of the 80 Assembly districts. The closest county was San Francisco where the vote was 50.66 percent in favor, 49.34 percent opposed. The next closest county was Alameda County where the vote was 52.21 percent in favor, 47.79 percent opposed. These are also the two heaviest Democratic counties in California. The five Assembly districts where Proposition lost, narrowly in each district, are located in San Francisco, Oakland, and south-central Los Angeles, and are the most Democratic Assembly districts. There is

some evidence of this same behavior among Republicans, the NO vote in heavily Republican Orange County was above the statewide NO vote.

In these highly partisan areas, the political parties tend to be the strongest, these voters are more likely to follow the leadership of their respective parties. As it was, the party leaders only managed a slight majority for their position in their most loyally partisan areas. In the less partisan, more politically marginal areas, the party leaders suffered overwhelming repudiation.

Declining Party Loyalty and the Passage of Proposition 198:

There is a long history of independent voting among Californians. While the state is becoming more polarized, with the San Francisco area more liberal and southern California more conservative, loyalty to the individual parties has declined. A larger percentage of Californians are registered as "non-partisan" today than 30 years ago, a smaller percentage as Democrats or Republicans. Declining party loyalty helps explain the strong YES vote on Proposition 198.

Californians also have a history of ticket-splitting which also explains the YES vote. In 1994, Californians elected a Republican governor and a Democratic senator; a Democratic lieutenant governor and a Republican attorney general. Not since 1946, has one party swept all the statewide offices. Strong legislators regularly run far ahead of party registration.

Historically California voters have not been "deliverable" by political machines or bosses. The Progressive Reforms

early in this century were a reaction against bosses. Californians have traditionally favored more not less political competition. This history is reflected in the strong YES vote for Proposition 198 among adherents of both political parties.

Why Party Leaders Could Not Deliver a No Vote on Proposition 198:

While California voters are generally loyal to their party's *candidates*, they are not loyal to party *leaders*. It should be no surprise that a majority of registered Democrats and registered Republicans opted for a more competitive and open political process by voting for the open primary, and that majorities of both parties rejected the more restricted and closed process urged upon them by their party leaders. This is fully in keeping with political behavior of California voters and why California has always been described as a "weak party" state.

It must be remembered that party chairs and other statewide officials are not elected by party registrants but rather are selected at conventions attended by a minuscule number of party activists. There are numerous examples of party registrants refusing to follow the lead of party leaders.

- In each election, consultants and the parties themselves publish slates of candidates and ballot measure positions urging their adherents to follow their leadership. They don't; the influence of partisan slate cards upon the actual voters is minimal at best.
- In state with far more registered Democrats, Republicans constantly win statewide office despite the partisan urgings of Democratic leaders.

- When Republicans urged Californians to adopt Republican plans for reapportionment four times in the 1980s, they even failed to carry heavily Republican Orange County.

In California, where party leaders are *not* elected above the county level, it is common for the party registrants to hold different views on organizational issues than party leaders. That is the case with Proposition 198, where both parties voted through their registered members to support an open process in contravention of the advice of their party leaders. In this matter, the party leaders do not represent the party because the party itself has spoken differently at the ballot box.

Section Two

CALIFORNIA'S HISTORY OF ANTI-PARTYISM

California is known as an "anti-party" state. It has a political system that gives its political parties form but little function. The state prefers weak political parties and has purposely kept them weak. Professors Bell and Price in *California Government Today* describe the situation very well:

> In theory the British monarch presides over the British Commonwealth of nations; and in theory, California's political parties are directed and coordinated by a three tiered system of state conventions, state central committees, and county central committees. But in reality none of this happens. For the most part, California's

> official party organizations play only a minor role in influencing and shaping state politics.[1]

Bell and Price go on to note that "The main reason California's political parties have traditionally been so weak and ineffective hinges largely on key historical features." California began as a Republican state in the years following the Civil War, largely because California has sided with the Union and was populated by people from Republican leaning states. As political machines developed in the late 19th Century, they developed within the context of the Republican party. California also experienced much of the Gilded Age political corruption associated with late 19th Century urban organizations, especially the political machine dominated by the Southern Pacific Railroad. Muckraking journalist Frank Norris described the railroad in *The Octopus* as "the leviathan, with tentacles of steel clutching into the soil, the soul less force, the iron charted power, the monster, the octopus."

In the early 20th Century California became imbued with the Progressive Reforms that promised to end political control by the railroad. When the San Francisco district attorney was assassinated in the courtroom while prosecuting the city's notorious boss, Abe Ruef, his task was taken over by Hiram Johnson, an active member of the Lincoln Roosevelt League of Republican reformers. Most political contests took place within the Republican party, and Johnson captured that party's nomination for governor in 1910, and went on to be elected. No more anti-party California politician every existed; he set out to

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[1] *California Government Today*, Charles G. Bell, Charles M. Price, 1988, page 141

destroy the political bosses and the railroad by destroying the political parties. In his classic study of California politics, *Ronnie and Jesse*, noted journalist Lou Cannon described the lasting impact of Johnson's anti-party politics:

> (These) political changes have haunted California's electoral structure ever since the Johnson era, and are primarily responsible for the state's political exceptionalism. . . . One of the requirements of that exceptionalism was a politics dominated by personalities. The Progressive movement was not the one-man affair that it often seems in retrospect, but Hiram Johnson came to personify the entire reform movement precisely because he appeared to stand apart from the party structure and appeal directly to "the people".[2]

Cannon wrote this at the height of Ronald Reagan's governorship, partially to explain why the conservative Republican Reagan had been so successful in an otherwise Democratic state, an explanation he attributed to the long history of personality rather than party politics. Cannon writes that the reformers specifically established a system in which parties would have no power. "Reformers of that day seem to have reasoned something like this: the large corporations and special interests dominate the political parties; hence destroy the parties." This phenomenon in California has come to be known as "anti-partyism."

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[2] *Ronnie and Jesse, A Political Odyssey*, Lou Cannon, 1969, page 48

Reformers exercised "anti-partyism" in a number of ways, all but one of which are still with us. Owens and Costantini in their study *California Politics and Parties* list four main legacies of the Progressive era:

> Population mobility within the state and heavy in-migration from without the state make the development of stable, locally based party organizations difficult. Other factors are statutory in nature and in large part deliberately designed to produce organizational debility. Four measures adopted by the Progressives half a century ago have particularly served to place California's parties in a legal straitjacket. First, the system of nonpartisan local elections has acted as a deterrent to the development of strong party organizations at the grass roots level. Second, the establishment of a comprehensive civil service system has made it impossible to build strong party organizations through the distribution of patronage. Third, provisions for direct legislation through the initiative and referendum have diminished the role of parties in the formation of public policy. Fourth, the crossfiling system of making nominations for partisan office allowed members of one party to run in the primary of the other party and to receive its nomination for even the highest public office while the official party was forced to sit idly by.[3]

The cross filing system existed in California from 1911 to 1959. Under this system, a legislator or member of congress could file to run in both the Democratic and Republican primaries, and so long as he or she won their own

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[3] *California Politics and Parties*, John R. Owens, Edmond Costantini, 1970, page 4

party nomination, they would win the nomination of the other party as well. Reproduced as Appendix A is the official result of the 1950 Assembly primary and general election. The party of the legislative candidate is not shown, only the number of votes received as a Democrat and as a Republican. On the general election ballot, the winners, usually incumbents, are shown as the nominees of both parties.

California went from being a Republican to a Democratic state in the 1930s, as demographic change and the New Deal brought droves of Democrats into the state. Democrats hated cross filing because it allowed Republicans to "hide" their partisan leanings while seeking supposedly partisan office. Democrats did not succeed in winning control of California state government until 1958, whereupon in 1959, they promptly abolished crossfiling.

The end of crossfiling marked the end of what was known as the Nonpartisan Legislature, and the beginning of a real two party system in California. But it did not result in a shift of political power to the parties, but rather to the legislative leaders. The California Assembly has been a partisan body since the Speakership of Jess Unruh (1961-1969), the California Senate since the early 1970s. But that doesn't make them "party" bodies. The state central committees play no role in partisan legislative politics. Decisions on who will be supported for the legislature, who will be financed, who will be professionally managed has been made by legislative leaders since the days of Unruh, and this is true in both parties.

In 1996, the struggle to hold the Republican Assembly was led by Speaker Curt Pringle and his political lieutenants, none of whom worked for the state Republican party. The effort to win back the Assembly was directed by Minority Leader Richard Katz and consultants he choose, none of whom were under control of the state Democrats. Legislative Democrats are credited with putting together an effective campaign under the direction of Katz and Senate President Pro-Tem Bill Lockyer, who headed the Senate Democratic effort and raised more than a million dollars for each targeted Senate district. Party leaders and party organizations played only a minimal role in the 1996 legislative contests.

This has been the case since Speaker Unruh seized the power to elect legislators from the lobbyist community in the 1960s. Legislators have carefully kept the party officials out of their political campaigns. As Bell and Price point out:

> Throughout most of this century, incumbent officeholders have dominated and controlled their respective parties' State Central Committee. Incumbents knew one another, had more prestige than their non-officeholder colleagues, and could appoint many additional members to the SCC. Historically little was done by the SCC without the incumbents' blessing.[4]

In the more partisan context following crossfiling, the parties became adjuncts of the legislative-executive leaders. Central committees meet to debate issues, write platforms, run registration drives, and perhaps most

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[4] *California Government Today*, page 147

importantly, act a conduit for party funds. The political parties can mail literature to members at a lower postal rate cost than can candidates, therefore, funds to support candidates are often run through the parties. But the California parties, unlike elsewhere, have no role in setting state policy, cannot direct patronage, and have no say over who gets on the ballot. California managed to develop a two party system in which the parties themselves remained historically weak. During the past 16 years of Republican governors, the governors were the Republican party leaders. Gov. Deukmejian choose political allies and regularly installed them as GOP chairs during his eight years in office. Gov. Wilson has been at odds with some party activists; thus he has largely ignored the state party. During the 1996 presidential campaign it was patently obvious that Wilson and his political operatives ran the Dole campaign in California, not the state party.

Democrats have coalesced party control through strong legislative leaders such as former Speaker Wille Brown. Since Democrats controlled the legislature while Republicans controlled the governorship, it was as easy for Democratic legislative leaders to dominate their party as it has been for GOP governors to dominate the Republican political scene.

There is another reason why California parties remain weak, and that is the desire of the people to make policy decisions themselves through he initiative process. Undeniably, this has weakened the legislature; it further weakens the parties. The following table shows the number of successful initiatives in recent decades compared to earlier times.

Number of Initiatives and Their Success Rate

Decade	*Qualified Initiatives*	*Adopted Initiatives*	*Percent*
1912-1919	30	8	27%
1920s	35	10	29%
1930s	35	9	26%
1940s	19	6	32%
1950s	10	2	20%
1960s	9	3	33%
1970s	22	7	32%
1980s	44	21	48%
1990-1996	49	18	37%

Bell and Price trace the popularity of the initiative in recent decades (more initiatives were approved in the 1980s than in the prior four decades combined) to "a continuing decline in public confidence in government leaders and political institutions." It is no exaggeration to say that the major policy decisions of the past two decades have come about via the initiative. Californians want tough law enforcement; they have rewritten the criminal justice system via Three Strikes, the Victims Bill of Rights, the death penalty law – all enacted through initiatives. California's fiscal structure is the embodiment of Proposition 13 and its successors. Air and water discharges must meet Proposition 65 standards. The coastal act and the entire system of land use along the coast results from an initiative. The system of campaign reporting, legislative term limits – all initiatives. The list goes on and on.

The dominating influence of the initiative is certainly evident in the fact that the names Howard Jarvis, Paul Gann and Harvey Rosenfield are known to far more Californians than the names of the party chairs, or even most legislators.

The passage of Proposition 198 reflects this California political behavior. The ballot arguments of the party chairs were rejected because these are not people the public associates with major policy. Voters have shown disenchantment with legislative leaders as well by embracing term limits (Proposition 140) and campaign reform (Proposition 208), actions which directly threaten political power of incumbent legislators. The public has consciously acted to weaken the political class in California whenever given the opportunity in recent elections.

In fact, many people think we have too strong a two party system in California. Criticism is often directed at the congressional delegation as being too polarized to work together on behalf of the state. The plethora of initiatives in often blamed on partisan gridlock in Sacramento that keeps the Republican governor and Democratic legislature from coming to consensus on legislation. Voters have taken power into their own hands through the initiative in reaction to this partisan gridlock.

Proposition 198 was part of that process. Voters are neither aware nor interested in the well being of California's political parties since they do not see the parties as significant political forces whose activities are relevant in their lives. As Owens and Costantini well put it:

> California's anti-partyism reveals itself most directly in the official organization of its political parties. They are, quite simply, weak and ineffectual. Indeed, for many observers familiar with politics in other large urban states, they scarcely deserve to be called "organizations" at all.[5]

Section Three

CALIFORNIA VOTERS DISENFRANCHISED BY THE CLOSED PRIMARY

Approximately one quarter of California voters are effectively precluded from participation in the election of their state legislator or Member of Congress because they are not a member of the dominant political party in a district "safe" for that party.

In these districts, the decision as to who will be elected is made at the primary election. Under the closed primary system, voters who do not belong to the dominant party cannot vote in the primary. Their vote is meaningless in the general election because the district is not competitive between the parties.

A district may be considered "safe" if it meets several criteria:

- The district has not been contested between the parties since it was created in the 1991 reapportionment
- The area covered by the district has been historically dominated by one party,

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[5] *California Politics and Parties*, page 4

- No significant money was spent in 1994 or 1996 opposing the nominee of the dominant party
- The incumbent won by more than 55 percent of all the votes cast in both 1994 and 1996

One measure of a "safe" district is its rating by the California Target Book, a nonpartisan analysis of all California legislative and Congressional districts. The Target Book rates districts as "target", "strong Democrat/strong Republican", and "safe Democrat/safe Republican". All districts considered "safe" in this report were rated "safe" in both 1994 and 1996 by the Target Book, and are rated "safe" for the incumbent party in the 1998 election[1].

A majority of California legislative and Congressional districts can be rated as "safe." There are several reason for this.

- Although California is very competitive for statewide office, it is becoming more polarized at the district level. The San Francisco Bay Area becomes more Democratic each election, while the Southern California suburbs become more Republican.
- The 1991 Supreme Court Masters reapportionment created the maximum number of "majority-minority" and "minority influence" districts in response to the Voting Rights Act. This tended to "pack" Democrats in heavily minority and very safe districts, with the consequence that more safely Republican districts were created outside the minority areas. This was especially evident in the Central Valley, an area with traditionally marginal districts.

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[1] The author is co-editor of the California Target Book

- The Masters reapportionment also created a large number of truly competitive districts, as evidence by the shift in control of the Assembly twice in this decade. This has lead the parties to target a greater number of marginal districts, but consequently to target fewer "long shot" districts. The Masters reapportionment, which ignored the needs of incumbent legislators, resulted in more truly competitive districts *and* more truly safe districts, especially in heavily minority areas.

California had 15,662,075 registered voters for the 1996 general election. Forty-six of the 80 Assembly districts met the criteria as "safe" districts in 1996. The number of voters *not* in the dominant party in these 46 districts was 3,888,566. These voters were effectively disenfranchised from voting for State Assembly because they did not belong to the dominant party, and could not vote in the primary election which determined the nominee. The disenfranchised voters for Assembly equaled 24.8 percent of all California voters. See Table 1.

Twenty-one of the 40 State Senate districts met the criteria as "safe" in 1994 and 1996 (only half were up each year). The number of voters *not* in the dominant party was 3,686,530. This number is equal to 23.5 percent of all California voters. See Table 2.

Thirty-three of the 52 Congressional districts met the criteria as "safe" in 1996. The number of voters *not* in the dominant party was 4,492,379. This number is equal to 28.7 percent of all California voters. See Table 3.

It is also important to remember that a voter disenfranchised for Assembly is most likely disenfranchised

for Senate and Congress as well. Under the 1991 reapportionment, Senate districts consist of two whole Assembly districts. The Court Masters applied the same Voting Rights Act and state constitutional standards to Congressional districts as they did to legislative districts.

Section Four

WASHINGTON STATE'S STRONG TWO PARTY SYSTEM

Washington shares with its neighbor Oregon and a number of northern tier states a political system heavily influenced by Scandinavian social democracy. Washington's politics are quite similar to Minnesota's – both states were settled by Scandinavians who shaped the political institutions. This has meant fairly liberal politics, strong labor unions, and a vigorous two party system.

Washington was once so liberal Roosevelt's campaign manager referred to it as the "Soviet State of Washington." Democrats dominated the state in the post war years, with two Democratic senators, Warren Magnuson and Henry Jackson, who between them served 87 years. But Republicans managed to elect a number of popular governors, including Dan Evans who served as governor and senator over 25 years.

The *Almanac of American Politics* described contemporary Washington politics as follows:

> In today's Washington, the fulcrum of the electorate has moved from blue collar to white collar, from economic class warfare to cultural wards between liberals and conservatives. Washington moved toward the Democrats in the

1980s, and Michael Dukakis 50%-48% victory here forshadowed Bill Clinton's 43%-32% win in 1992, with a big 24% for Ross Perot. The Democratic trend swept down the ballot: Seattle liberal Patty Murray was elected senator and Mike Lowry governor, and Democrats won eight of the nine House seats, winning the house vote 56% to 41%. Then in 1994, the pendulum went the other way, Republican Senator Slade Gorton was re-elected 56%-44%, and Republicans won seven of the nine House seats, carrying the House vote 51%-49% – a 10% gain. Most startling was the defeat after 30 years of House Speaker Thomas Foley.

Washington's dramatic two party politics continued in 1996, when Democrat Gary Locke was elected governor, the third Democrat in a row, and yet Republicans won control of both houses of the State Legislature (they had won the lower house in 1994) for the first time in 16 years. The GOP also held six of the nine U.S. House seats.

Washington's politics put a lie to the argument that an open "blanket" primary somehow inhibits two party competition. Consider the following:

- For nearly 40 years Democrats held both U.S. Senate seats. Then in the 1980s, Republicans managed to win both seats. They are now divided among the two parties.
- From 1952 until 1964, Republicans held a majority of the U.S. House seats; from 1964 until 1994 Democrats held a majority; in the last two elections Republicans have won a majority. Six of the nine House seats have changed parties in the 1990s, one seat twice!
- The Washington House of Representatives went from 65 Democrats; 33 Republicans after the 1992 election

to 61 Republicans and 37 Democrats after the 1994 election. The current House of Representatives is 56 Republicans, 42 Democrats.

Any allegation that the blanket primary inhibits women and minorities from winning office is also refuted by Washington's experience:

- Washington is the only state to have nominated minorities for top office in the last two elections. Ron Sims, a black Democrat, won 44 percent as the Democratic nominee for the U.S. Senate in 1994. Gary Locke, a Chinese American Democrat, was elected governor in 1996. This is in a state that is 90 percent white! Six of the 149 state legislators are minorities. The percentage of minority legislators (4%) is below the state percentage of minorities (10%) because the only concentration of minority voters are found in downtown Seattle.
- Washington has the highest percentage of women in its legislature of any state – 39 percent. Washington's U.S. House delegation has included a women since at least 1952; currently two of the nine members of Congress are women. One of the two U.S. Senators is a woman, as is the state attorney general. The Republican nominee for governor in 1996 was a woman, who beat several men in the blanket primary for the Republican nomination.

Washington has no party registration.

Section Five

ACTIVITIES OF THE POLITICAL PARTIES

Despite historically weak party organizations, the parties do have one advantage in California politics. Because of their tax status, they are able to mail political literature at reduced mail rates. Therefore, it has been a common

practice of political consultants to use the party's mailing permit for much of their direct mail campaign activity. A party paid mailer is also able to give a candidate some cover if the mailer is a negative mail piece critical of the opponent. In the 1996 election, the Democratic State Central Committee paid for a large number of negative mailers in targeted districts.

The parties are also effective fundraisers; presidents and governors often appear at party sponsored fund raising dinners.

Among the other activities undertaken by state and county central committees are:

- Voter registration efforts
- Get out the vote drives on election day
- Conventions and the adoption of party platforms
- Mailing of materials urging a vote for the party's candidate and ballot positions
- Sponsorship of debates, periodical meetings, organizational efforts.

None of these activities constitute exercise of any political authority; the fund raising and campaign spending is largely a "passthrough" in support of the party's candidates. All these activities are organizational in nature, intended to increase the electability of the nominees of the party, and none are interfered within any way by Proposition 198.

What then is the *burden* imposed by Proposition 198 on the political parties? There is none; the party central committees may still meet, debate issues, raise funds and

do the other non-policy chores they have done for a century. Their political power is not diminished by Proposition 198 because they have no political power. The burden, if there is any, falls on statewide candidates and legislators who must appeal more broadly in the primary election, and thus campaign to a larger constituency than was the case under the closed primary. This burden, however, does not fall on the parties.

* * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

[637] THE WITNESS: Mervin Field, F-I-E-L-D.

DIRECT EXAMINATION

BY MR. RICKARDS:

Q. Good morning, Mr. Field.

A. Good morning.

Q. Sir, what is your occupation?

A. I'm a public opinion researcher.

Q. Okay. Are you connected with Field Poll?

A. That's correct.

Q. All right. Are there a number of organizations that are connected with that effort?

A. That's correct. The – in 1946, Field Research Corporation was established, a general practice market and opinion research agency in California, and in 1947, the Field California Poll was established. And in 1976 the Field Institute was established.

Q. And could you explain briefly, if you would, the differences between those entities and what hat you're wearing today?

A. All three are survey research organizations. Field research Corporation is the so-called mother [638] ship. It is a fairly large general practice market and opinion research agency that undertakes contracts for proprietary

studies for companies, for government agencies, and other entities.

The Field Poll and the Field Institute is an independent nonpartisan public policy organization. We do studies on voting, public policy, studies that are financed by media, by foundations, by subscribers, and academic institutions. We do not work for party interests, either political parties or interests that have a cause in a ballot proposition campaign.

* * *

[642] MR. RICKARDS: Your Honor, for your information, the questions which are on the left side of that chart and the number, that can be found at page 7 of the report.

Q. I wonder if you would just now go through this chart for me and explain to me what you did and what the results were?

A. Well, that chart is one finding from more extensive findings where we are covering issues in respect to how the public felt about the political parties, how they felt about being independent or being a firm party supporter, whether they followed government and public affairs, and why they voted, and a number of other aspects to the party and the electoral process.

In that measure, we posed four possible primary election system changes. The top one, as you can see, we changed the primary system so that [643] voters who declined to state a party affiliation can vote for each candidate in a primary election. Seventy-three percent say they would adopt that change. Again this is in 1983.

The second measure was change the primary system so all candidates for an office are listed together on the same ballot regardless of party, and 69 percent favored that change.

Then we come to the third one, which has a great deal of similarity to the measure on which voters voted in last year's primary election, and the the question was in a sense posed change the primary system to an open primary where voters choose from among the candidates of all the parties and each party's top vote-getter becomes its nominee in a general election.

At that time, again in 1983, 66 percent of the people said adopt that change.

In the last issue we posed change the primary system to a nonpartisan primary where voters choose from among candidates without party designations and the top two vote-getters compete in the general election. There at that time, the voters rejected that change. They said – 53 percent said keep that present system and just 39 percent say adopt the [644] change.

* * *

[645] Q. Okay. I think probably you explained this, but what sort of conclusions did you draw from these responses?

A. Well, the conclusion I drew, as it relates to Prop 198, that there was remarkable consistency over a 13-year period, and that when the vote on Prop 198 was in, comparing that with the study that we did then 13 years prior, it showed that this concept, as it's posed here, and

as it was posed in 198, struck a deep-seated cord with the voting public.

* * *

[650] Mr. Field, this is a chart entitled how [651] Democratic and Republican Registered Voters Describe Themselves.

I wonder if you could indicate to me what polling this represents and what the figures are?

A. First, those percentages should be read vertically, and each of those columns add to a hundred percent.

The classifications come, again, from our aggregated poll data. As I stated, we take anywhere from 5,000 to 8,000 interviews a year in our statewide polling, and we ask the public – we ask voters how do they identify themselves. Do they identify themselves as a strong Democrat or not strong Democrat, or do they not identify with the party at all. And we find that among registered Democrats, 41 percent identify as a strong partisan, 36 percent consider themselves as not strong partisans, and 23 percent do not identify with a party, they identify as an Independent or something else.

Among Republicans, it's 44 percent who identify them as strong Republicans, 32 percent as not strong Republicans, and 24 percent registered as Republicans but they don't identify with the Republican Party.

[652] Q. Let me ask you, if you would, Mr. Field – I'll give you again what's L-4. If you could comment on these two charts, how the Democrat and Republican registered voters describe themselves, the partisanship

point, and the self-identification compared to registration.

What conclusions do you draw from these?

A. Well, the conclusion I draw are that voters, irrespective of how they registered, do not have – they're not strongly identified with the party. I would say you don't see this sense of solidarity. The fact that they're describing themselves as Democrats or Republicans, and that they – the parties, the rank and file party members, I would say, are not strong partisans, and tend toward being independent.

We see that, in addition to these charts, repeatedly in our surveys people will say that I don't vote the party, I vote for the candidate, and I consider myself independent.

For example, in our 1983 study, which I showed earlier, and we found in subsequent studies, they would rather describe themselves as independent rather than being a party member.

* * *

[658] A. Well, in this report, and in numerous reports that we have produced, we see that participation has been declining steadily over the years. This in the presidential election in California, in the general election, it was just a little more than 50 percent. In the primary in '96, the participation rate was just a little over 30 percent. Typically, in nonpresidential elections recently, the participation rate in general elections has been around roughly 45 percent, give or take a few percentage points. And in the primary, it's sometimes a little less than 30 percent.

And that represents a decline, a marked and significant decline over the last 30 years.

Q. Can you give an opinion, and expert opinion based on polling you've done as to whether or not you think it's likely that the blanket primary will increase voter participation?

A. Well, I think that when you offer voters more choices, and given the fact that those who don't affiliate with major parties will be able to vote, and that's a significant segment of voters, that you [659] will get more voters. How many more, I do not know.

The one problem that we have, and what I've noted, and I think other scholars have noted with dismay, is that with this continual decline, that you would hope that there would be some events, some mechanisms that would galvanize the public to participate.

But looking at the possible implications of an open primary, you would have to assume that there would be more voting because, first, the people who don't affiliate with any major party would vote. You also would get people from either party. If it's an uncontested election, there's a tendency for them not to turn out, not to participate. But if the process is opened up and more candidates are offered, that would have a strong tendency to stimulate more voting.

* * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

* *

[842] THOMAS ANTHONY QUINN,

a witness called by the Defendants, having been first duly sworn by the Clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. SUMNER:

Q. Mr. Quinn, can you tell how you're currently employed?

A. I'm a consultant with Goddard Claussen Public Relations here in town.

* * *

[845] Q. That's exhibit I. Let me ask you about Proposition 198. You've taken a look at the Los Angeles Times poll and the Field polls on Proposition 198, have you not?

[846] A. Yes, I have.

Q. Okay. Did the Los Angeles Times poll address the vote of minor parties?

A. It's not entirely clear. In the Los Angeles Times poll is how Republicans voted, how Democrats voted, and then how independents voted. I took a look at the actual breakdown of who cast ballots in the 1996 primary.

Ninety percent of the ballots were cast by the two major parties. Three percent of the ballots were cast by the eight minor parties, seven percent were cast by nonaffiliated voters.

It is possible that as a – if you're doing an exit poll, if a hundred people come out of the voting booth, three people may be members of these minor parties, and their opinions would have been asked. I suspect, although I do not know, that the Los Angeles Times may have included that among the independent category. Which, by the way, showed that it passed among that category of voters.

Q. A catchall category?

A. That's right.

Q. Given that rather limited base of information, do you have any opinion as to how the minor parties may have voted on 198?

A. There's no way to –

[847] MR. PARRINELLO: I would like to object. There's no basis for him to render an opinion on that point because he doesn't know based upon the data provided.

THE COURT: Overruled.

THE WITNESS: My sense is that on organizational issues, these minor parties probably vote much like the major parties do. Where they differ are on ideological issues. So it would be my opinion that they probably, as with all other voter groups at least tested in the L. A. Times exit poll, voted in favor.

Q. BY MR. SUMNER: And you're characterizing Proposition 198 as an organizational issue?

A. Yes, how you organize the parties.

* * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted In Printing]

* * *

[505] DAVID OLSON

a witness called by the Defendants, having been first duly sworn by the Clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

THE WITNESS: David Olson, O-L-S-O-N.

* * *

Q. Professor Olson, where are you currently employed?

[506] A. University of Washington in Seattle.

Q. Can you briefly go over your professional experience since receiving your Ph.D., please?

A. I joined the faculty at Indiana University and served there for five years. I joined the faculty at the University of Washington in 1974, and I have been at the University of Washington since.

* * *

Q. And have you been the chair of the political science department there?

A. For most of the 1980s I chaired the department.

* * *

[513] Q. Sir, is it your testimony – okay. So your testimony is that the crossover voting has not significantly altered the outcome of a primary race in Washington?

A. That's correct.

Q. Now, I know that in several of the prior testimony there have been references to the Dixie Lee Ray race in Washington. Could you clarify that race, go over it and what had happened in that race?

A. Well, I think I should probably – I entered my definition of crossover voting, and I wanted to be very specific about that.

With respect to my definition, how I'm conceptualizing, how I'm using the concept of raiding, is where individuals move from their normal and usual column into the opposition column which they usually and normally don't vote in with the intention of undermining the prospects of candidates in that column that they've moved into. So that raiding has the intentionality of decreasing the eventual electoral prospects of candidates who are going to be eventually faced in the general election.

You've asked about one of the cases that has been raised here. The argument has been made that [514] the conservative Democratic candidate, Dixie Lee Ray, received not just the crossover votes of the more liberal Republicans, but of such a volume that it put her over what otherwise would have been the winning candidates in that gubernatorial primary in the Democratic primary.

There were three candidates in the Democratic column. One, Marvin Derling, a very liberal environmental

lawyer, had carved out a niche in the Democratic Party. The second candidate was Len Sawyer, a former Speaker of the House of Representatives and a quite conservative Democrat.

Dixie Lee Ray, came to this election with considerable strengths. She had been a longtime faculty member at the University of Washington. She had taken a 12-year leave of absence from the University of Washington. I remembered exactly. Because of her, the university refuses now to allow any of the rest of us to take more than a two-year leave of absence.

She was on leave of absence for 12 years. She served as the director of the Pacific Science Center from the opening of the Worlds Fair in Seattle in 1963 forward. This was a statewide institution offering scientific education particularly to [515] children and adolescents that gave her a television show that she regularly provided commentary on science. She was appointed by Richard Nixon as the first woman to chair the Atomic Energy Commission.

And so Dixie Lee Ray was a very prominent, very highly regarded conservative Democrat, who wins the Democratic primary. She very well could have gotten crossover support from liberal Republicans in this race. But what's instructive to me is that she goes on in the general election and wins the general election in 1976.

What I see in this case from my familiarity with the three candidates in the Democratic column, and the dynamics that went on in that election, is that a highly visible, name-familiar conservative Democrat received a degree of support from liberal Republicans, and who

later went on in the general election to retain that support from liberal Republicans and to win the gubernatorial race of 1976.

Is this raiding? Not by my definition. Not by my conceptualization. The Republicans who moved over were not of mischievous intent. They weren't trying to sabotage. They were not trying to undermine a candidate. They were intentionally [516] expressing a preference for a visible and what I consider to be in their case a preferred candidate.

* * *

Let me provide the two arguments, even though I'll be shorter on the argument that was a raid because it's just been given by Professor Costantini.

We're in the Great Depression. There's an incumbent governor, Clarence Martin. He's a Democratic. He's a fairly conservative Democrat. [517] He's opposed in that Democratic primary by John Stevenson, who was a more liberal Democrat.

The argument that this was a raid is that the incumbent governor did prevail in the primary, and it appears that he did receive crossover support from Republicans, and particularly that he received independent votes in the 1936 election, which by my definition are not raiding or crossovers.

So my version of this event is that here's a case of a well-known and quite popular incumbent Governor who defeats an opponent who's to the left of him in the primary and who carries considerable strength within the Democratic Party itself. But Clarence Thomas – Clarence

Martin prevails with the support of Republican crossovers and with the support of independents.

What's interesting is, not unlike 1976, after prevailing in the Democratic primary, he goes on in the general election to win. Now, for the this to be raiding, there had to have been an absence of viability in the Republican Party for Republicans to move massively over to the Democratic column in the primary.

* * *

[519] Q. Could you cite to any recent example where an election would have been ripe for raiding but raiding did not occur?

A. Well, I think that the 1996 presidential preference primary in the state of Washington. We held our presidential preference primary on the exact same date as the state of California. And it's simply remarkable. This is fairly late in the [520] campaign season. It was not definitive by this time period in March of what the outcome was going to happen with the Republican Party's nominee. But it was well known who the Democratic Party nominee was going to be.

Bill Clinton had the grand opposition of Lyndon Larouche, who yesterday we heard had been determined by the DNC not to be a qualified opponent, had a very long list of opposition candidates to Bob Dole in Washington presidential preference primaries.

So here we got a situation. We've got six or seven – I don't remember the exact number off the top of my head, but –

* * *

[521] THE WITNESS: On the Republican column, we had Dole, Buchanan, Forbes, Keyes, Alexander, Gramm, Lugar, Dornan.

Now, this is a situation that is perfectly positioned for the raid.

In the Democratic column, Clinton has got not just this presidential preference primary, but he's got the nomination locked up by this time. His only opponent in the state of Washington was Lyndon Larouche. So there's every incentive, if raiding is a common, usual occurrence, that it ought to occur in this case where the Democratic Party would use by its strategists the movement, direction of voters over to pick the weakest candidate or candidate who can create mischief in the Republican column.

What I find interesting in this blanket primary, voters are given the option of voting as unaffiliated voters and to also have the option of voting as declared Democrats.

So you have got a actual laboratory here of closed primary taking place simultaneous with a blanket primary. The closed primary are the declared Democrats and the declared Republicans. [522] They have to declare that they are Republicans or Democrats to get the ballot.

You also have the right to vote in this primary by the unaffiliateds. It, in effect, creates a blanket primary effect.

What's interesting here is that the closed primary voters here, the declared Democrats, support Clinton at about the same rate as the blanket primary Democrats.

THE COURT: Are they getting different ballots?

THE WITNESS: They're getting different ballots.

THE COURT: So the declared Democrat would not get the Republican names.

THE WITNESS: That's correct. The declared Democrat gets a ballot that just has Larouche and Clinton on it. The unaffiliated voter gets a ballot that has both of the Democratic candidates and all of the Republican candidates.

So we've recreated here a laboratory that comes very close to the closed primary versus the blanket primary.

What's interesting about this is Clinton does as well in the closed as the blanket. Dole does [523] nearly as well in the blanket as he does in the closed. His margin is eroded in large part by Steven Forbes' better performance in the blanket primary, the unaffiliated voters. But still, between 58 percent and 63 percent of Dole's margin between the closed and the blanket, or as they're labeled here, the declared and the unaffiliated, is ever so marginal.

The last point here that I think is terribly important, if you look at the total turnout across the two parties, Washington is a very competitive two-party state. The total turnout for the Democratic candidates is 329,000 plus. The total turnout for the Republicans is 335,000 plus.

So what is happening here, with the greatest opportunity to engage in strategic voting, there appears to be no evidence of that taking place in this particular case.

And, surely, there is no evidence of raiding that is taking place by these more recent data.

• • •

[543] Q. Okay. And Dixie Lee Ray then as it turned out – I guess this could not conceptually be a case of raiding for you because Dixie Lee Ray did not turn out to be the weakest of the opposing party's candidates?

A. Right.

Q. So the fact she won means by definition there was no raiding in that race, correct?

A. Yes. That's – it's an important point in this case that the winner of the primary sustains that base of support and goes on to win in the general.

[544] And if we look at the Alaska 1974 case, the exact same thing is happening. J. Hammond wins the Republican primary, goes on to win the general. If we look at the 1936 election, Clarence Martin wins the primary, goes on to win the general. In all three of these cases that we focus so much attention on, this dynamic holds true.

• • •

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

CALIFORNIA DEMOCRATIC PARTY, et al.,

v. (Filed Dec. 4, 1997)

CASE NUMBER:
CIV S-96-2038 DFL PAN

BILL JONES,

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 11/24/97.

Jack L. Wagner,
Clerk of the Court

by: /s/ C. Di Lillo
C. Di Lillo, Deputy Clerk

Supreme Court of the United States

No. 99-401

California Democratic Party, et al.,

Petitioners

v.

Bill Jones, Secretary of State of

California, et al.

ORDER ALLOWING CERTIORARI.
Filed January 21, 2000

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 3, 2000. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 31, 2000. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 17, 2000. Rule 29.2 does not apply.

January 21, 2000

Mar 3 2000

No. 99-401

FILED
MAR 03 2000
CLERK

In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE AND FREEDOM PARTY, *et al.*,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA and CALIFORNIANS FOR AN OPEN PRIMARY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Whether California's new blanket primary law – which allows voters of any political affiliation to cross party lines at will and to vote in other parties' primaries – violates the First Amendment rights of political parties to associate and to choose their own nominees.

Whether the associational rights of political parties are afforded less protection under the First Amendment than the associational rights of other private associations.

PARTIES TO THE PROCEEDINGS

Parties to the proceedings in the Court of Appeals were:

- the California Democratic Party, the California Republican Party, the Libertarian Party of California, the Peace and Freedom Party, Art Torres, Kathy Bowler, Paul Jorjorian, Gail Lightfoot, and C.T. Weber, petitioners herein;
- Bill Jones, Secretary of State of California, and Californians for an Open Primary, who are respondents herein;
- Michael Schroeder, Shawn Steel, and Donna Shalansky, who were appellants below but who have made no appearance here.

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Eu v. San Francisco Democratic Central Comm., 489 U.S. 214 (1989) 22, 26, 33, 38, 39

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Sweezy v. New Hampshire, 354 U.S. 234 (1957) 38, 40

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) ..... *passim*

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) ..... *passim*

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Report of Registration, May 1998 (California Secretary of State, 1998) http://www.ss.ca.gov/elections/elections_u.htm 36

Bibby, *Politics, Parties, and Elections in America* (Nelson-Hall, 3rd ed. 1996) 30

Bone, *American Politics and the Party System* (1949) 32

E.E. Schattschneider, *Party Government* (Rinehart 1942) 21

Proposition 3 California Secretary of State's Vote98 website http://vote98.ss.ca.gov/VoterGuide/Proposition/3text.htm 16

Statement of Vote, Primary Election, June 2, 1998 (California Secretary of State, 1998) http://primary98.ss.ca.gov/Final/Official_Results.htm 36

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet.App. 1a-44a)[1] is reported at 169 F.3d 646. The opinion of the United States District Court for the Eastern District of California (Pet.App. 45a-85a) is reported at 984 F.Supp. 1288.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 4, 1999. Petitioners filed a petition for rehearing with suggestion for rehearing en banc, which was denied on June 4, 1999. The petition for certiorari was filed on September 2, 1999, and was granted on January 21, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of California's new blanket primary law is at Pet.App. 89a-96a. The key provisions are new California Elections Code sections 2001 and 2151, which state in pertinent part:

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[1] "Pet.App." refers to the appendix to the petition for certiorari. "J.A." refers to the parties' Joint Appendix. "R.T." refers to the reporter's transcript. "Pl.Ex." refers to petitioners'/plaintiffs' exhibits. "Def.Ex." refers to respondents'/defendants' exhibits.

2001. All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation.

* * *

2151. At the time of registering and of transferring registration, each elector may declare the name of the political party with which he or she intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.

The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, and that all properly registered voters may vote for their choice at any primary election for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance. The voter registration card shall include a list of all qualified political parties.

STATEMENT

In March 1996 California voters adopted a statutory initiative, Proposition 198, that completely reworked California's primary election law. Before Proposition 198, parties chose their nominees at a primary election where only party members could vote. Each party's nominee, plus any independent candidates, then squared off in a general election. Under Proposition 198, California now

uses a "blanket primary" system that allows voters of any political affiliation to cross party lines at will and to vote in other party primaries. Four political parties – the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party – and certain party officials sued to enjoin implementation of Proposition 198. The question presented by this case is whether California's new blanket primary law violates the right of political parties and their members to associate and to choose their own nominees.

A. California Partisan Primaries Before Proposition 198.

For about the first 50 years of California's existence as a state, party nominations were made at conventions:

> At the time of the constitutional convention of 1879, as when our first Constitution was adopted in 1849, a candidate's name could be placed on the ballot only if he was nominated by a political party meeting in convention. For many years, the Legislature exercised but little authority in this field, and the selection of delegates to, and the conduct of, the nominating conventions were usually left to party organizations. In 1897 (Stats. 1897, p. 115) the Legislature provided for nomination by petition of electors. This legislation was held unconstitutional. (*Spier v. Baker*, 120 Cal. 370 [52 P. 659 (1898)].) A further legislative effort to modify and control the machinery of elections was also held unconstitutional. (*Britton v. Board of Commrs.*, 129 Cal. 337 [61 P. 1115 (1900)].)

Jones v. McCollister, 159 Cal.App.2d 708, 711, 324 P.2d 639 (1958).

The California Constitution was amended in 1900 and again in 1908 to allow increased legislative control of primary elections. The 1908 amendment (Art. II, § 2½) explicitly required primary elections:

> the Legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions at elections to be known and designated as primary elections[.]

Socialist Party v. Uhl, 155 Cal. 776, 780 (1909). The Primary Election Law of 1909 created a closed primary[2] and California partisan primaries remained closed until the adoption of Proposition 198. *Id.* at 793.

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[2] American primary elections fall into three broad categories:

> *Closed Primary* – Voters declare a party preference prior to voting and then vote only in the party they have declared. This system is "closed" in the sense that each party primary is closed to voters who have not declared a preference for that party.
>
> *Open Primary* – Voters may vote the ballot of only one party, but make that choice in the privacy of the polling place. This system is "open" in the sense that each party primary is open to all voters, but each voter may vote for candidates of only one party.
>
> *Blanket Primary* – Voters may vote for any candidate in any race. The voter's party preference has no effect – each voter gets the same ballot and can vote for any candidate on the ballot.

984 F.Supp. at 1291-1292 (Pet.App. 52a-54a); Pl.Ex. 7, p. 2; R.T. 635-636 [Costantini Report].

California law allows electors to register or re-register up to 29 days before an election. Cal. Elec. Code § 2107. Thus, the effect of California's prior closed primary law was to require voters to register with a party at least 29 days before the primary if they wanted to vote in that party's primary.

The highest vote-getter in each party's primary becomes that party's nominee in the ensuing general election, and each party nominee appears on the general election ballot followed by his or her party affiliation. Cal. Elec. Code §§ 15451, 13105(a). The only candidates who appear on the general election ballot with a party affiliation are those who win their party's nomination at the primary. California also allows independent candidates to appear on the general election ballot. These independent candidates do not run in the primary – they submit petitions bearing nominating signatures and, if sufficient signatures are submitted, appear on the general election ballot as "independent." Cal. Elec. Code § 8300 et seq.; § 13105(c).

At present there are seven ballot-qualified parties in California.[3] The Republican and Democratic parties have been ballot-qualified since the first primary elections held at the beginning of the 20th Century. The Libertarian

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[3] A party becomes ballot-qualified if it meets any of the following conditions: (a) at the preceding gubernatorial election, any of its statewide candidates received 2% or more of the statewide vote, (b) voters equal to 1% of the vote at the preceding gubernatorial election affiliate with the party, or (c) voters equal to 10% of the vote at the preceding gubernatorial election sign and file a petition to form a new party. Cal. Elec. Code § 5100.

Party qualified in 1980. J.A. 46; R.T. 635-636 [Winger Report]. The Peace and Freedom Party qualified in 1968. *Ibid.*

B. The Adoption of Proposition 198, and the Changes Wrought by It.

Proposition 198 is a statutory initiative that was adopted at the March 1996 primary election.[4] The guts of Proposition 198 are contained in new Elections Code sections 2001 and 2151, which state in pertinent part:

> 2001. All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation.
>
> * * *
>
> 2151. At the time of registering and of transferring registration, each elector may declare the name of the political party with which he or she intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.
>
> The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, and that all properly registered voters may vote for their choice at any primary election for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance. The voter registration card shall include a list of all qualified political parties.

Pet.App. 89a-90a. The remainder of Proposition 198 works technical changes to the ballot[5] and the sample ballot.[6]

The result is a blanket primary where the primary voter is permitted to choose the nominees of any number of political parties at the same election, without regard to her own political affiliation or ideology. In other words, she may decide to vote for a Republican nominee for President, a Democratic nominee for Governor, a Libertarian nominee for United States Senator, etc. There is no party ballot; each voter receives the same ballot.[7] The parties have no way to know whether their "nominee" has been selected by party members or by others. The highest vote-getter under each party's label goes on to the general election regardless.[8]

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[4] The text of the ballot pamphlet concerning Proposition 198, including the text of the initiative, is located at J.A. 86-103; R.T. 636.

[5] Cal. Elec. Code §§ 13203, 13206, 13230; Pet.App. 91a-93a.

[6] Cal. Elec. Code §§ 13300, 13301, 13302; Pet.App. 93a-95a.

[7] There is one exception. The members of party county central committees, which perform certain statutorily-mandated tasks, are elected at primary elections. Only party members can vote in these elections. Cal. Elec. Code § 2151; Pet.App. 89a-90a.

[8] Cal. Elec. Code § 15451.

The ballot arguments in favor of Proposition 198 leave no doubt that the goal of its proponents was ideological, specifically, to produce more moderate candidates:

> It [the closed primary] favors the election of party hardliners, contributes to legislative gridlock, and stacks the deck against more moderate problem-solvers.
>
> * * *
>
> [Proposition 198] strengthens the parties by increasing voter participation and by electing candidates from both parties with broader bases of support.

J.A. 89; R.T. 636 [Argument in Favor]; J.A. 95; R.T. 636 [Rebuttal to Argument Against]. A significant part of the State's evidence at trial went to establish the fact that Proposition 198 would produce more moderate candidates. Defendants' expert David Olson, a political scientist from the University of Washington, testified:

> Q. . . . It is your opinion then that the blanket primary has produced more moderate candidates in Washington?
>
> A. Correct.
>
> Q. And as you have stated during your deposition, you think that's a good result, is that correct?
>
> A. That's correct.

R.T. 540 [Olson]. Defendants' expert Elisabeth Gerber, a political scientist at UC San Diego, said the same. R.T. 732-733 [Gerber].

With the adoption of Proposition 198, California joins a small group of states – Alaska, Washington, and Louisiana – that have blanket primaries. J.A. 55; R.T. 635-636 [Cain Report].

C. A Description of California's Minor Political Parties, Particularly Petitioners Peace and Freedom Party and Libertarian Party of California.

California has a long and rich history of minor parties. J.A. 39; R.T. 635-636 [Winger].[9] Minor parties have appeared on the statewide ballot in every partisan statewide California election in the last 120 years, with two exceptions. *Ibid.* There is substantial historical evidence that minor parties influence public policy. As stated by petitioners' expert on minor parties,

> many of the ideas advocated by the early minor parties, have long since been adopted as public policy. Collective bargaining rights, women's suffrage, direct election of U.S. Senators, the eight-hour day, abolition of child labor, anti-monopoly legislation, an end to segregation, the initiative, and other ideas, faced overwhelming hostility and opposition when they were first advocated. All these ideas were advocated by minor parties, decades before the major parties

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[9] Richard Winger, publisher of the *Ballot Access News*, submitted an expert report on minor parties. See J.A. 39-54; R.T. 635-636 [report]. His curriculum vitae is at Plaintiffs' Exhibit 5, pp. 10-11.

> accepted them, yet now we take them for granted.

J.A. 48-49; R.T. 635-636 [Winger].

Petitioners Peace and Freedom Party and Libertarian Party of California are explicitly ideological entities that embrace positions outside the current political mainstream. Party members are reconciled to the likelihood that these parties will win few elections to important policy-making positions in the near future. People join these parties because they want to support candidates who will give voice to their ideas and ideologies, with the hope of influencing public policy in the long run. J.A. 48; R.T. 635-636 [Winger]; J.A.57; R.T. 635-636 [Cain].[10]

The *Peace and Freedom Party* was organized in 1968 to nominate a presidential candidate who would oppose U.S. involvement in Vietnam. In 1971, it became the California branch of the Peoples Party, which advocated full rights for young people, the 30-hour week at 40 hours pay, free mass transportation, community board control over local police, an end to the draft, free medical care for everyone, the decriminalization of psychoactive drugs, abolition of the Universal Code of Military Justice, and a bill of rights for prisoners. In 1974, the party formally declared itself in support of socialism. J.A. 45; R.T. 635-636 [Winger]. The party platform advocates doubling

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[10] Professor Bruce Cain, Professor of Political Science at UC Berkeley, submitted an expert report and testified as an expert on the effect of Proposition 198 on political parties and on the outcome of primary elections. See J.A. 55-75 [report]; R.T. 342-460, 978-1002 [testimony]. His curriculum vitae is at Plaintiffs' Exhibit 6, pp. 32-39.

the minimum wage and indexing it to the cost of living; guaranteeing the right of all workers to organize and strike and forbidding striker replacement; abolishing NAFTA and GATT; abolishing the CIA, NSA, and AID; and allowing self-determination for all nations and peoples of the world, including Puerto Rico and all U.S. territories. J.A. 82; R.T. 635-636 [1996 Platform].

The Peace and Freedom Party sees little difference between the Republican and Democratic parties. As a party flier explains, "your real choice is between the capitalist, corporate-oriented Republicrats and the socialist, human-oriented Peace & Freedom Party." J.A. 84; R.T. 635-636 [party flier]. The party publishes a monthly newsletter that describes the party's position on a range of issues. Pl.Ex. 22; R.T. 635-636 [exemplars]. The party budget is less than $20,000 a year. R.T. 184 [Weber].

The *Libertarian Party* has a different political perspective. The party's Statement of Principles, unchanged since 1972, states in part:

> We hold that all individuals have the right to exercise sole dominion over their own lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the right of others to live in whatever manner they choose.
>
> * * *
>
> Since governments, when instituted, must not violate individual rights, we oppose all interference by government in the areas of voluntary and contractual relations among individuals. People should not be forced to sacrifice their lives and property for the benefit of others.

> They should be left free by the government to deal with one another as free traders; and the resultant economic system, the only one compatible with the protection of individual rights, is the free market.

J.A. 76; R.T. 635-636. The party opposes involuntary taxation and would legalize victimless crimes. J.A. 46; R.T. 635-636 [Winger]. The Libertarian Party also sees little difference between the two major parties. With respect to the Second Amendment, the party has stated:

> It should be obvious by now that the Republicans are just as willing as the Democrats to throw away your constitutional rights – rights that were bought with the blood of American patriots.

J.A. 81; R.T. 635-636 [party flier].

The Libertarian Party is the first minor party to place its presidential candidate on all state ballots for two elections in a row since the Socialist Party did so in 1912 and 1916. J.A. 46; R.T. 635-636 [Winger]. The party publishes a monthly newsletter that describes the party's position on a range of issues. Pl.Ex. 21; R.T. 635-636 [exemplars]. Members of the party governing body must sign a pledge that "I hereby certify that I do not believe in or advocate the initiation of force as a means of achieving political or social goals." J.A. 79; R.T. 635-636; R.T. 153-155.

D. Proceedings Below.

Petitioners filed a complaint seeking to enjoin implementation of the new blanket primary law.[11] Named as defendant was Bill Jones, California Secretary of State, who is responsible for administering California election laws. See Cal. Gov't Code § 12172.5. Californians for an Open Primary intervened as a defendant. (Defendants will be referred to as "the State.")

The District Court conducted a four-day nonjury trial in the summer of 1997. The thrust of petitioners' case was that Proposition 198 violates the First Amendment right of political parties and their members to associate and to choose their own nominees. In addition to testimony from officials of the four political party plaintiffs, testimony was received from opposing teams of experts, one team testifying on behalf of plaintiffs and the other team testifying on behalf of defendants. The experts agreed on little, particularly when it came to quantifying the "burden" imposed on political parties by Proposition 198 and the extent to which Proposition 198 would further state "interests." However, the experts appeared to agree on two basic propositions: (1) under the new blanket primary law substantial crossover voting will occur (crossover voting occurs when a voter who is not registered

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[11] In addition to the political parties, plaintiffs included Art Torres, Chair of the California Democratic Party (R.T. 51-52); Michael Schroeder, Chair of the California Republican Party (R.T. 6-7); Gail Lightfoot, immediate past-chair of the Libertarian Party of California (R.T. 147-148); and C.T. Weber, Chair of the Peace and Freedom Party (R.T. 175).

with a party votes in that party's primary), and (2) crossover voting will change the results of an unknown number of primary races.[12]

The District Court awarded judgment to defendants. The District Court stated that political parties are already

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[12] Defendants' polling expert, Mervin Field, testified that a survey he conducted in the spring of 1997 (shortly before trial) showed that 37% of Republican voters planned to vote in the 1998 Democratic gubernatorial primary, that 20% of Democratic voters planned to vote in the 1998 Republican U.S. Senate primary, and that the preferences of crossover voters differed significantly from party voters. Pl.Ex. 8; R.T. 635-636 [Tables 1 and 3 of Addendum to Field Report]; R.T. 668-669. Defendant's expert Professor David Olson testified that in Washington (a blanket primary state) one-quarter to one-third of voters cast their entire ticket in one party, meaning that two-thirds to three-quarters crossover in at least one race in any given election. J.A. 136; R.T. 636 [Olson]. Defendants' expert Professor Jonathan Nagler estimated a Republican crossover in the 1992 Washington Senate race of twenty percent and a Democratic crossover rate of 24% in the 1996 Washington Secretary of State race. Def.Ex. H, p. 34; R.T. 635-636.

Plaintiffs' expert Professor Bruce Cain testified that under Proposition 198 "it is inevitable that parties will be forced in some circumstances to give their official designation to a candidate who is not preferred by a majority or even plurality of party members." R.T. 421. He explained the circumstances under which crossover voting is most likely to occur: "If one party has an uncontested race and the other a contested race, then voter who would normally participate in the uncontested race will feel more tempted to put their vote where it counts." J.A. 62; R.T. 635-636. Plaintiffs' expert on minor parties, Richard Winger, concluded that the rate of crossover voting in minor party primaries would be "much, much higher than in major party primaries." He noted that since 1968, 44 minor party primaries had been decided by fewer than 100 votes. J.A. 52-53; R.T. 635-636.

significantly regulated by the state and that the analogy between political parties and other private associations is therefore "imperfect at best." 984 F.Supp. at 1296 (Pet.App. 65a). As for crossover voting, the District Court concluded that

> [t]here will be a small number of elections in which the crossover vote proves decisive, and there will be other elections in which the possible importance of the crossover vote will be an influence on the conduct of the primary campaign and the conduct of elected officials.

984 F.Supp. at 1298 (Pet.App. 71a). According to the District Court, the majority of the crossover voting would be "benevolent" and in any event not significantly higher than the level of crossover voting in open primary states. *Ibid.* Ultimately, the District Court concluded that "the blanket primary imposes a significant but not severe burden on [petitioners'] associational rights." 984 F.Supp. at 1300 (Pet.App. 77a). Applying the balancing test articulated by this Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), the District Court concluded that this burden was justified by several state interests, all of which "reduce to one fundamental contention: according to defendants, Proposition 198, like other Progressive Era reforms, enhances the democratic nature of the election process and the representativeness of elected officials." 984 F.Supp. at 1301 (Pet.App. 80a).

The Court of Appeals adopted the District Court's opinion and affirmed the District Court's judgment. 169 F.3d at 647-648 (Pet.App. 8a). The Court of Appeals later denied a petition for rehearing with suggestion for rehearing en banc. Pet.App. 87a.

E. Relevant Post-Trial Events.

After the adoption of Proposition 198, the Republican National Committee and the Democratic National Committee stated that their national party rules would not allow delegates to be seated at their national conventions who had been selected by the blanket primary. As a result, the California Legislature placed "Proposition 3" on the November, 1998 ballot. This measure would have created a closed primary solely for choosing delegates to each of the presidential nominating conventions.[13] The measure was defeated. The Legislature then amended the California Elections Code to require the reporting of presidential primary election returns in two ways: (1) by the total number of votes cast by all voters for each candidate, and (2) by the total number of votes cast by voters affiliated with the candidate's party. Cal. Elec. Code §§ 15151, 15373, 15500. The national parties will use the second count to apportion delegates to their presidential nominating conventions.

In February 1999 the Peace and Freedom Party ceased to be a ballot-qualified party in California because its registration had slipped below one percent of the previous total gubernatorial voted, and because no statewide candidate received at least two percent of the vote in the previous statewide election. Cal. Elec. Code § 5100; *see* also *Child of the '60s Slips*, Los Angeles Times, February 17, 1999, at B-6.

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[13] The text of Proposition 3 is available at the California Secretary of State's Vote98 website, online at http://vote98.ss.ca.gov/VoterGuide/Propositions/3text.htm.

SUMMARY OF ARGUMENT

Political parties play a unique role in promoting our national commitment to the principle that debate on public issues should be wide-open and robust; "they exist to advance their members' shared political beliefs." *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring and dissenting). The nomination of candidates is the central function of a political party because it is the nominees who, if successful at the general election, will advance the interests of party members. "[I]n the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa." *Ibid.*

Political parties enjoy freedom of association protected by the First Amendment. The freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). This is because "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions[.]" *Ibid.* A political party's right to choose its own nominees is core associational activity. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359-360 (1997).

California's new blanket primary law, Proposition 198, strikes at the very heart of party associational rights. A blanket primary is the only primary system that allows a voter to join in a party's nominating process without requiring *any* act of affiliation with the party. Proposition 198 will inevitably lead to the selection of party "nominees" who are supported by neither a majority nor a

plurality of party members. It is no response to say, as did the District Court, that "in the typical election, the cross-over vote will not be decisive." 984 F.Supp. at 1300 (Pet.App. 76a). The other side of that coin is that in an unknown number of cases, the crossover vote will be decisive. The goal of Proposition 198 is to make crossover votes count and to give non-party members a significant role in choosing party nominees. This is precisely what violates the First Amendment.

Proposition 198 will be particularly debilitating to minor parties. The two minor party petitioners in this case – the Libertarian Party of California and the Peace and Freedom Party – are small ideological organizations that occupy opposite ends of the political spectrum. Both are outside the political mainstream because they want to be outside the mainstream; both find the major parties hypocritical and essentially indistinguishable. Party members have banded together to pursue their own distinctive ideologies with the hope of winning public support and influencing public policy. Proposition 198 will allow the entire California electorate to join in the minor party nominating process, flooding the minor party primaries with voters who know nothing about the parties' ideologies. In the most fundamental way, the blanket primary denies minor party members the right to choose their own nominees and to pursue their own shared political interests.

The District Court's conclusion that "at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations" (986 F.Supp. at 1296 (Pet.App. 65a)) has potentially extreme consequences. To the extent that major

parties lack attributes of other private associations, it is because political parties are already significantly regulated by state law. In particular, they are required to choose their nominees by primary election. But if each new restriction of party associational rights can be justified to pointing to the previous restriction, party associational rights can be completely extinguished. The decision in this case, which ratifies a radical incursion into party associational rights, raises the specter of state-run parties.

The State has wide latitude to regulate elections to ensure that they are fair and honest. But the State cannot first require parties to nominate by primary election, and then structure the primary elections to deprive the parties of their First Amendment rights. California need not have a primary system at all. But if California chooses to conduct primary elections, it must respect the political parties' freedom of association. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986).

ARGUMENT

I. The Primary Is the Major Theater for Resolving Ideological Struggles Within a Political Party. For That Reason, a Party's Right to Define its Membership and to Choose its Own Nominees Is a Basic Freedom of Association Protected by the First Amendment.

A political party has been aptly described as:

> a voluntary association, instituted for political purposes, with the goal of effectuating the will

> of its members. The party's ultimate goal, in the electoral process, is to obtain control of the levers of government by winning elections, so that it may then put into operation its policies and philosophies. . . . In order to accomplish this goal, the party seeks to nominate those candidates who are most likely to win the general election, while remaining most faithful to the party's (i.e., its members') policies and philosophies. *The party's selection of its candidates therefore is an ultimate and crucial element of the party members' political activities.*

Nader v. Schaffer, 417 F.Supp. 837, 847 (D.Conn. 1976) (citations omitted, emphasis added), *aff'd*, 429 U.S. 989 (1976).

The nominating process is the major theater for resolving ideological struggles within a party. The single most important way that a party defines and advances the interests of its members is through the choice of nominees:

> The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs. A party performs this function, in part, by "identify[ing] the people who constitute the association, and . . . limit[ing] the association to those people only." *Having identified its members, however, a party can give effect to their views only by selecting and supporting candidates.* A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of particular

> elections, candidates are necessary to make the party's message known and effective, and vice-versa.

Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring and dissenting) (emphasis added, internal citations omitted); *see also id.* at 615-616 (lead opinion of Breyer, J.) ("A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure"). The importance of nominations in shaping party policy cannot be overemphasized. As E.E. Schattschneider said in his classic 1942 study of American parties, "[t]he nature of the nominating procedure determines the nature of the party; he who can make the nominations is the owner of the party." E.E. Schattschneider, *Party Government* (Rinehart 1942) at p. 64.

It is now well settled that political parties enjoy freedom of association protected by the First Amendment. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). The freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). As this Court explained in *La Follette*:

> On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions – thus impairing the party's essential functions – and that political parties may accordingly protect themselves "from intrusion by those with adverse political principles."

Ibid. The freedom to associate also protects a party's right to select a " 'standard bearer who best represents the party's ideologies and preferences.' " *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (quoting *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (1975) (Tamm, J., concurring in the result), *cert. denied*, 424 U.S. 933 (1976)).

To be sure, states have broad regulatory power over the conduct of elections. *Tashjian, supra*, 479 U.S. at 217. This power is founded both on the Time, Place and Manner clause of Article I, Section 4,[14] and on the commonsense recognition that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 712, 730 (1974). But the power to regulate must be exercised without infringing upon "basic constitutional protections." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Rather,

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[14] Article I, Section 4, Clause 1 states: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

> [w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the " 'character and magnitude' " of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's " 'important regulatory interests' " will usually be enough to justify " 'reasonable, nondiscriminatory restrictions.' "

Timmons, supra, 520 U.S. at 358 (internal citations omitted).

II. Proposition 198 Is a Severe Burden on Party Associational Rights Because it Forces a Political Party to Open its Nominating Procedure to Voters Who Have Absolutely No Affiliation with the Party.

A. *Tashjian* Controls the Result Here.

The District Court stated that "[p]erhaps the closest case is [*Tashjian*], but in *Tashjian* the Court addressed the reverse of the situation presented here[.]" 984 F.Supp. at 1293 (Pet.App. 58a). *Tashjian* is indeed the closest case and it controls the result here.

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) addressed the question whether Connecticut could enforce a closed primary law on a political party that sought to open up its primary to independent voters.

Connecticut had used a closed primary system for many years. *Id.* at 211-212. Noting that many voters were not affiliated with a party, the Republican Party in 1984 adopted a rule opening its primary to unaffiliated voters and then sued to enjoin the closed primary law. *Id.* at 212-213. A federal District Court entered summary judgment enjoining application of the closed primary statute to the Republican party. *Republican Party of Connecticut v. Tashjian*, 599 F.Supp. 1228 (D.Conn. 1984). The Second Circuit affirmed, *Republican Party of Connecticut v. Tashjian*, 770 F.2d 265 (2d Cir. 1985), as did this Court.

This Court's opinion in *Tashjian* began by analyzing the magnitude of the constitutional burden. The Court observed that "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Id.* at 224. The closed primary law trenched on the party's associational rights by

> plac[ing] limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Id. at 215-216 (internal citation omitted). Having reached that conclusion, the Court closely reviewed Connecticut's justifications for the closed primary law. Finding the proffered interests inadequate, the Supreme Court held the statute unconstitutional as applied to the Republican Party. *Id.* at 225.

This Court recently reaffirmed its holding in *Tashjian*. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) upheld a Minnesota law barring fusion candidates.[15] *Timmons* stressed that "[t]he New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes. . . . *That is, the New Party, and not someone else, has the right to select the New Party's 'standard bearer.'* " *Id.* at 359 (internal citation omitted) (emphasis added). *Timmons* went on to state that "while *Tashjian* and *Eu* involved regulation of political parties' internal affairs and core associational activities, Minnesota's fusion ban does not." *Ibid.* Thus *Timmons* makes clear that *Tashjian* is still good law and that it stands for the proposition that a political party's nominating process is core associational activity that is protected by the First Amendment.

The District Court's opinion cannot be reconciled with *Tashjian*. There is nothing peculiar to California parties that would make them less entitled than Connecticut parties to protection of their associational rights at the time of nominating their candidates, "the crucial juncture at which the appeal to common principles may be translated into concerted action[.]" *See Tashjian, supra*, 479 U.S. at 215-216. Nor is there anything peculiar to California about the numerous state interests allegedly served by the blanket primary. The District Court noted that all these various interests boil down to one contention: The blanket primary will enhance the democratic nature of elections and the representativeness of public officials.

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[15] Fusion is "the nomination by more than one political party of the same candidate for the same office in the same general election." *Id.* at 354, fn. 1.

984 F.Supp. at 1301 (Pet.App. 80a). Any state could and would make the same claim about virtually any change to its primary system.

Further, the associational right asserted here is if anything much stronger than the right asserted in *Tashjian*.[16] Petitioners in the present case seek to choose *their own* nominees; they seek to limit the nominating process to those who have affiliated with a party and "to protect themselves 'from intrusion by those with adverse political principles.' " *La Follette, supra*, 450 U.S. at 122 (interior citations omitted). This is precisely the right protected by the First Amendment, the right to choose a standard bearer who best represents *the party's* ideologies and preferences. *Eu, supra*, 489 U.S. at 224. On the other hand, the Connecticut Republican Party sought to allow *outsiders* to join in the nomination process. *Tashjian, supra*, 479 U.S. at 235 (Scalia, J., dissenting) ("The Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster").

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[16] It is also much greater than that asserted in *Timmons*. *Timmons* noted that the fusion ban at issue there "reduce[s] the universe of potential candidates who may appear on the ballot as the Party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party." *Timmons, supra*, 520 U.S. at 363. Proposition 198 allows those not affiliated with the party to cross over and vote in every party primary election.

B. The New Blanket Primary Law Is More Intrusive of Party Associational Rights than Any Other Nominating Procedure.

The District Court's conclusion that Proposition 198 imposes a "significant but not severe" burden on party associational rights has no support in precedent, in the record, or in common sense. 984 F.Supp. 1300-1301 (Pet.App. 77a). Consider the following comparison:

The Constitutionally-Protected Right	Proposition 198
"[T]he [party], and not someone else, has the right to select the [party's] 'standard bearer.' " *Timmons, supra*, 520 U.S. at 359.	The voter registration card shall inform the affiant that . . . *all properly registered voters may vote for their choice at any primary election for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance.* Cal. Elec. Code § 2151 (emphasis added).

Proposition 198 is not a slight restraint, it is not a minor imposition, it is not a glancing blow. It is a full-scale, head-on, point-blank assault.

It is simply no response to say that "in the typical election, the cross-over vote will not be decisive." 984 F.Supp. at 1300 (Pet.App. 76a). The point is that some 400 to 600 party nominees are chosen during each two-year election cycle in California, and some unknown number

of them will now be chosen by voters who have no affiliation with the party.[17] Nor is it any response to say that the crossover voting will likely be "benevolent."[18] 984 F.Supp. at 1298 (Pet.App. 71a). Regardless of the motive, the result is that non-party members play a role, on occasion a decisive role, in choosing a party's nominee. Republican political consultant Sal Russo said it well when he stated:

> Q. . . . How do you define who's the best candidate; how do we know who the best candidate is for the Republican Party?
>
> A. Well, I'm defining quite clearly the best candidate [as] the candidate the party wants, even though I may not be particularly keen on the choice. I think the party has that – that's what the party's most important function is, I think, is to select our candidate.

R.T. 304. Former California Republican Party Chair Robert Naylor added:

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[17] In each two-year cycle, California elects 80 Assemblymembers, 20 State Senators, and 52 Congressmembers. Depending on the year, Statewide, Board of Equalization, and U.S. Senate races may also be on the ballot. As a general rule, there will be at least three party primaries for each office: a Republican primary, a Democratic primary, and a minor party primary.

[18] The term "benevolent cross-over voting" was not used by any of the expert witnesses. Apparently the District Court used the term to combine voters who cross party lines to vote for their first choice candidates with voters who vote strategically for their second choice. R.T. 353-356; J.A. 61-65; R.T. 635-636 [Cain – describing strategic voting].

> But [Proposition 198] will have a deleterious effect on the morale of those volunteers and members of the party who expect everybody's shoulder to be at the wheel.
>
> When you are in a boat and a couple people have oars but aren't rowing very hard because they fundamentally don't agree with the direction the boat is going, it slows the boat down.

R.T. 206.

The District Court also concluded that a blanket primary does not differ from an open primary in that both allow crossover voting, and that a decision invalidating Proposition 198 would necessarily invalidate the primary systems of perhaps 35 states that apparently use some form of open primary. 984 F.Supp. at 1291-1295 (Pet.App. 53a-63a). This conclusion is uncritical and wrong. A blanket primary differs significantly from an open primary. A blanket primary is the only primary system that allows a voter to join in a party's nominating process without making any act of affiliation with the party. As Justice Powell noted in *La Follette*:

> [T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party. The real issue in this case is whether the party has the right to decide that only publicly affiliated voters may participate.
>
> The situation might be different in those States with "blanket" primaries – i.e., those where voters are allowed to participate in the primaries of more than one party on a single occasion, selecting the primary they wish to

vote in with respect to each individual elective office.

450 U.S. at 130, fn. 2 (Powell, J., dissenting). It may be that open primary systems in other states will present questions as to what constitutes a sufficient act of affiliation with a party.[19] The answer to those questions can await a case that presents them.

The District Court's comments on crossover voting rates in various primary systems were based on the testimony of a single witness, Jonathan Nagler, an Associate Professor of Political Science at the University of California, Riverside.[20] R.T. 767. With all due respect to Professor Nagler, his testimony was based on numerous assumptions and definitions, all of them the subject of debate. He described his review of the academic literature as "a brief review of a brief literature." Def.Ex. H, p. 4; R.T. 636. He defined "crossover voter" to exclude independent voters who voted in a party primary. R.T. 796. He also defined "crossover voter" to include voters who

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[19] The elections systems of the 50 states present numerous subtle variations that do not lend themselves to easy classification. Experts differ as to how to define the terms "open primary" and "closed primary," and all classification systems use subcategories like "semi-open" and "semi-closed." Compare Plaintiffs' Exhibit 7, pp. 2-3, R.T. 635-636 [Costantini Report] with Defendants' Exhibit E, pp. 2-4, R.T. 636 [Gerber Report]. See also Bibby, *Politics, Parties, and Elections in America* (Nelson-Hall, 3rd ed. 1996) at p. 134 [chart].

[20] The District Court did not make findings of fact, and certainly did not make any findings concerning crossover voting. The District Court did, however, cite to various reports, particularly Professor Nagler's. 984 F.Supp. at 1298 (Pet.App. 72a).

voted with the party in which they were registered, but who later stated in an exit poll that they affiliated with another party. R.T. 800. His study employed a "cutting edge" methodology that "didn't exist literally on this planet three or four years ago." R.T. 795. His testimony was plagued by questions as to whether the primaries in the states that he studied should be termed "open" or "closed."[21] Accordingly, his testimony cannot be the basis for any definitive opinion on crossover voting rates.

The District Court also concluded that "at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations." 986 F.Supp. at 1296 (Pet.App. 65a). The District Court noted that voters who register in a party do not pay dues and do not take an oath, they merely sign a registration card. *Ibid.* However, it should be noted that parties are not restrictive about their membership precisely because they are prohibited by law from being restrictive. California law allows any qualified voter to state an affiliation with a political party by signing a

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[21] Professor Nagler classified Ohio as an open primary state, and concluded that there was substantial crossover voting in Ohio. Def.Ex. H, p. 34; R.T. 636. But it turned out that Ohio allows same-day registration, and the voters that Professor Nagler counted as crossovers were actually re-registering in the party in whose primary they were voting. R.T. 822 [Nagler]. Thus the question: if someone changes party registration on election day and votes in the primary of his new party, is that voter a crossover voter? Professor Nagler's answer was "yes," though he conceded that one could just as easily answer the question "no," in which case the crossover voting rate in Ohio would be "zero." R.T. 824-825 [Nagler].

registration card.[22] Left to their own devices at an earlier point in this country's history, parties were considerably more restrictive. Samuel Adams' description of a caucus meeting antedates the Revolution:

> This day learned that the Caucus Club meets at certain times in the garret of Tom Dawes, the Adjutant of the Boston Regulars. He has a large house . . . and the whole club meets in one room. There they smoke tobacco till you cannot see from one end of the garret to the other. There they drink flip I suppose and they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, collectors, fierwards, and representatives are regularly chosen before they are chosen in town. . . .

Bone, *American Politics and the Party System* (1949) at 507; quoted in L. Friedman, "Reflections Upon the Law of Political Parties," 44 Cal.L.Rev. 65 (1956). Public dissatisfaction with the caucus system led to Progressive Era reforms such as the Australian ballot, the direct primary, and the current registration system. But a new Draconian restriction of party rights (the blanket primary) cannot be justified by pointing out that party rights are already restricted in some respects. This approach would legitimate a complete extinction of party associational rights, so long as the extinction were accomplished incrementally.

While the District Court was correct to note that the American experience has required accommodation between party associational rights and state power to

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[22] Cal. Elec. Code § 2151.

regulate the election process, the decision below results in nullification, not accommodation. The blanket primary is the nominating process most intrusive into party associational rights because it denies the very existence of those rights. If a party's First Amendment right to "choose the standard bearer of its choice" does not protect it from a blanket primary, that right is nothing more than a mirage. *See Eu, supra*, 489 U.S. at 224.

Finally, it is more than a little disturbing that Proposition 198 has been promoted and defended as producing more moderate candidates. To borrow respondents' antiseptic phraseology from the proceedings below, under the blanket primary, nominees will "stand closer to the median policy positions of their districts[.]" Appellee's and Intervenor's Brief in the Court of Appeals [6/25/98] at 51. This may be so, but a constitution that holds that "[t]he *independent* expression of a political party's views is 'core' First Amendment activity" does not permit California to force upon a party a nominating procedure that robs it of that independence. *See Colorado, supra*, 518 U.S. at 616 (emphasis added). Any other conclusion raises the troubling specter of state-run parties.

C. The New Blanket Primary Law Has a Particularly Severe Effect on Minor Parties.

Proposition 198 will be most debilitating to California's Peace and Freedom and Libertarian parties and to other minor parties. These parties are explicitly ideological entities that at least for the present are outside the mainstream of American politics. The Peace and Freedom Party is to the left of the spectrum, the Libertarian Party

(generally speaking) to the right. One thing the two parties have in common is that they see no significant difference between the two major parties. Yet the blanket primary now allows several million major party members to join in selecting the nominees for each of these minor parties.[23]

It appears that the drafters of Proposition 198 gave no consideration to its effect on minor parties. The ballot pamphlet does not even mention the minor parties, and many of the ballot pamphlet arguments in support of Proposition 198 seem irrelevant to them. For example, stating that Proposition 198 "[e]ncourages candidates to address issues" is not a meaningful statement to people who have formed their own partisan organizations to address issues.[24] Stating that Proposition 198 "[g]ives control back to voters" is not a meaningful statement to voters who are disgusted with the major parties and have formed associations to advance unpopular ideologies.[25] And stating that Proposition 198 "[s]trengthens the parties by increasing voter participation and by electing candidates from *both* parties with broader bases of support" concedes the major premise of this paragraph: the drafters of Proposition 198 gave no thought to its effect

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[23] The Peace and Freedom Party ceased to be a ballot-qualified party in California as of February 1999. That fact does not moot this case as to the Peace and Freedom Party because the party may register enough voters to re-qualify for the ballot.

[24] J.A. 95; R.T. 636.

[25] *Ibid.*

on minor parties, none of whom want to strengthen the major parties.[26]

"Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike[.]" *Jenness v. Fortson*, 403 U.S. 431, 441-442 (1971). Under Proposition 198, both major party candidates and minor party candidates must appeal to an electorate of 15 million people during the primary. Leaving aside the issue whether major party candidates have the resources to make such an appeal, minor party candidates clearly do not. Newspapers and broadcasters generally do not cover minor party races. J.A. 50; R.T. 635-636 [Winger]. Minor party candidates in important contested elections reach party members by mail, and the minor parties themselves reach party members through their newsletters. R.T. 624-625 [Winger]; Pl.Ex. 29 [Peace and Freedom newsletters]; Pl.Ex. 11 [Libertarian newsletters]. The minor parties and their candidates cannot afford to send mailings to the entire electorate.[27] As a result, non-party members voting in minor party primaries will almost certainly lack any knowledge of the candidates that they vote for. J.A. 53; R.T. 635-636 [Winger].

Petitioners' expert on minor parties, Richard Winger, concluded that under Proposition 198 there will be a dramatic increase in voting in minor party primary races, and that the new voters will not be party members:

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[26] *Ibid.* (emphasis added).

[27] The budget of the Peace and Freedom Party is "[p]robably less than $20,000 a year." R.T. 184. Neither the chair of the Libertarian Party nor the chair of the Peace and Freedom Party has a staff. R.T. 166, 184.

> In my opinion, if the new California primary law goes into effect, the vote for minor party candidates in primary elections will be *much* higher than it has been in the past. The new voters will not be party members. As a general proposition, I believe that minor party members voting in their own primary will be outnumbered by non-party members. Even where they are not outnumbered, the proportion of non-party voters will be very high – much, much higher than in major party primaries.

J.A. 53; R.T. 635-636. As it turns out, Mr. Winger hit the nail right on the head.

The June 1998 primary was the first election conducted under Proposition 198. The results of that election show massive crossover voting in several minor party primaries:[28]

Insurance Commissioner

Condit, P&F (Peace & Freedom)	72,535
Ramos, P&F	86,772
Total votes cast in P&F primary	**159,307**
Total P&F registration in district	**71,620**

[28] All the election results cited below are found in *Statement of Vote, Primary Election, June 2, 1998* (California Secretary of State, 1998) and are available on line at http://primary98.ss.ca.gov/Final/Official_Results.htm. The registration figures are found in *Report of Registration, May 1998* (California Secretary of State, 1998) and are available on line at http://www.ss.ca.gov/elections/elections_u.htm. The results of the 1998 primary are not in the record because the election took place 10 months after trial.

Congress, 1st District

Oglesby, Lib (Libertarian)	1,864
Rossi, Lib	2,489
Total votes cast in Lib primary	**4,333**
Total Lib registration in district	**1,939**

Assembly, 77th District

Metti, Lib	1,138
Meyers, Lib	2,331
Total votes cast in Lib primary	**3,469**
Total Lib registration in district	**1,264**

In each of these races, votes cast in the minor party primary exceeded minor party registration by a ratio of more than two-to-one. Without casting aspersions on any of the candidates for these offices, how can one say that any one of them is the "nominee" of his or her party?

Minor parties play an important part in a democracy:

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957). With Proposition 198 California takes a major step toward stifling the voices of minor parties.

III. The State Has Not Met Its Burden Of Showing That Proposition 198 Is Narrowly Tailored To Advance A Compelling State Interest.

Election regulations imposing severe burdens on First Amendment rights must be narrowly tailored and must advance a compelling state interest. *Timmons, supra*, 520 U.S. at 358. The State has the burden of proof on both issues. *Eu, supra*, 489 U.S. at 222. The State has met its burden on neither.

We will discuss in order the handful of interests advanced by the State in the Court of Appeals. That Court adopted the District Court's conclusion that all the interests "reduce to one fundamental contention: according to defendants, Proposition 198, like other Progressive Era reforms, enhances the democratic nature of the election process and the representativeness of elected officials." 169 F.3d at 660; Pet.App. 39a. This mega-interest, like many of the subsidiary interests it subsumes, is a predictive judgment not readily susceptible of proof. *Timmons, supra*, 520 U.S. at 361. It cannot justify the burdens imposed by Proposition 198.

Producing candidates more reflective of the general electorate. This is another way of stating that the blanket primary will produce more "moderate" candidates. Pursuing moderation in party nominations is not a legitimate state interest, much less a compelling one. As the Supreme Court has repeatedly stated, political parties

have associational rights, and one of those rights is the right to choose the standard bearer that best represents *the party's* ideology. *Eu, supra*, 489 U.S. at 224.

The State certainly has wide latitude to regulate elections to ensure that they are fair and honest. *Storer, supra*, 415 U.S. at 730. But the State cannot first require parties to nominate by primary election, and then structure the elections to deprive the parties of their First Amendment rights. California need not have a primary system at all. But if California chooses to conduct partisan primary elections, it must respect the political parties' freedom of association.[29] *Tashjian, supra*, 479 U.S. at 218.

Providing a voice to disenfranchised voters. The theory here is that minority party members who live in "safe" districts (districts where the minority party has little chance of winning) and independent voters are "disenfranchised." According to the State, the minority party members are disenfranchised because they can't vote in the election that counts (the partisan primary of the majority party) and independents are disenfranchised because they can't vote in any partisan primary. *See generally* J.A. 189-192; R.T. 636 [Quinn].

At the outset it should be noted that the State's use of the term "disenfranchised" is idiosyncratic. The State's

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[29] Abolishing the primary system would require an amendment to the California Constitution. Article II, section 5 of the California Constitution states that the Legislature "shall provide for primary elections for partisan offices[.]" All judicial, school, county, and city offices are nonpartisan. Cal. Const. Art. 6(a). The rest are partisan. Proposition 198, a statutory initiative, did not amend these constitutional provisions.

expert admitted that "this is not a legal term," and indeed it is not. R.T. 888 [Quinn]. All registered voters in California can vote in the general election, and all can choose to affiliate with a party and then participate in that party's primary election. If they find themselves unable to vote in a particular party primary, it is a result of their own decision. They are not "disenfranchised." *Nader, supra,* 417 F.Supp. at 847, *aff'd,* 429 U.S. 989 (requiring party enrollment before voting in partisan primary is not an absolute barrier to voting). Further, what might be a "safe" seat for one party today may not be tomorrow. R.T. 885 [Quinn].

The very concept of a political party presupposes the exclusion of those who do not share the interests of the party. Parties seek to advance their members' *shared* political beliefs. *Sweezy, supra,* 354 U.S. at 250. It is therefore inevitable that in a state like California, which requires parties to nominate by direct primary election, a blanket primary law will run head-on into the First Amendment. But this does not allow California to leverage its control over elections into control over the parties.

Increasing voter participation. This is simply a predictive judgment. It is by no means clear that the blanket primary would increase voter turnout. In determining turnout level, "the type of primary is a marginal factor." J.A. 69; R.T. 635-636 [Cain]. Further, there are more narrowly tailored and less intrusive means to increase voter turnout, such as allowing registration closer to the date of the primary. J.A. 68; R.T. 635-636 [Cain]. As one State expert stated, "If you were looking for the best tool to increase turnout this [the blanket primary] is not what you would pick." R.T. 1013 [Nagler].

Broaden debate on public issues. Assuming for the purpose of argument that this is a compelling interest, there is no reason to believe that Proposition 198 will advance it. "In fact, there are many informed observers who think that the problem in California is exactly the opposite: i.e., they lament the lack of distinct choices in American politics and feel that the system shuts out legitimate points of view that do not fall in the middle of the ideological spectrum." J.A. 66; R.T. 635-636 [Cain]. Evidence suggests that the blanket primary will suffocate those at the extreme of the ideological spectrum, the minor parties. J.A. 53-54; R.T. 635-636 [Winger]; R.T. 718-719 [Gerber].

Preserving voter privacy. There is absolutely no evidence in the record that invasions of voter privacy have been a problem in California. There is certainly no mention of this "interest" in the ballot pamphlet. This is a post-hoc rationalization.

Assuming that preserving voter privacy is a compelling interest, Proposition 198 does not promote that interest. Under the previous closed primary system, no one other than the voter knew how a particular vote was cast. All that was publicly known was the voter's party affiliation. Proposition 198 changes none of this. Partisan registration still exists and that information is still public. How a voter casts his ballot is still private. Further, there are less restrictive means available to pursue this interest. For example, the State could minimize public access to voter registration records.

In sum, the State's interests here reduce down to several which are speculative and one – the desire to

produce more "mainstream" or "moderate" candidates – which is fundamentally at odds with the First Amendment rights of each political party to choose a representative which best represents the ideological views of the party, *as defined by the party.*

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE AND FREEDOM PARTY, et al.,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA and CALIFORNIANS FOR AN OPEN PRIMARY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Whether California's new blanket primary law – which allows voters of any political affiliation to cross party lines at will and to vote in other parties' primaries – violates the First Amendment rights of political parties to associate and to choose their own nominees.

In the Opposition to the Petition, filed November 3, 1999, Respondents objected to the second Question Presented as not the question faced by the courts below and not properly before this Court. Respondents instead provided for this Court the proper question as characterized by the District Court and the Court of Appeals. Petitioners did not file a Reply Brief to the Opposition and did not object to Respondents' characterization of the second Question Presented. Respondents re-affirm that Question Presented as:

Whether the political parties' interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how the Open Primary Law will work in practice, the blanket primary law is unconstitutional on its face.

PARTIES TO THE PROCEEDINGS

Petitioners are the California Democratic Party, the California Republican Party, the Libertarian Party of California, the Peace and Freedom Party, Art Torres, Kathy Bowler, Paul Jorjorian, Gail Lightfoot, and C.T. Weber.

Respondents are Bill Jones, Secretary of State of California, and Californians for An Open Primary.

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CONSTITUTIONS, STATUTES OR REGULATIONS

This case involves the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, and California's Open Primary Act, an initiative measure (Proposition 198) adopted by California's voters on March 26, 1996. The Open Primary Act provides in relevant part:

> All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation. Cal. Elec. Code § 2001.[1]

[1] All statutory references are to the California Elections Code.

STATEMENT OF THE CASE

A. Introduction.

In 1996 the citizens of California concluded that the closed primary then used to select candidates for public office effectively disenfranchised millions of voters and produced government officials unrepresentative of the electorate at large. The voters overwhelmingly adopted the Open Primary Act allowing for a blanket primary system to enhance the democratic nature of the State's election process and the representativeness of its elected officials. Notwithstanding that Washington and Alaska have used the blanket primary for over 60 years, the petitioners, political parties and officials, now assert that the blanket primary is unconstitutional on its face. To date, every court that has considered this question has concluded that the blanket primary does not violate the First Amendment associational rights of political parties. No court has even intimated that the blanket primary is unconstitutional per se. The courts in this case carefully assessed the potential burden posed to the political parties and then balanced them against the interests of California's voters and citizens. Both the District Court and Ninth Circuit decided that the blanket primary does not violate petitioners' First Amendment associational rights. Opinion, Pet. App. 44a, 85a.[2]

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[2] The Ninth Circuit adopted the opinion authored by the District Court as its own. For ease of reference hereafter, respondents will regularly cite to the Opinion which appears in Appendix A of the Petition for a Writ of Certiorari (Ninth Circuit Court opinion), but shall refer to it as the decision of the District Court. "Pet. App." refers to the petition's appendix;

B. Factual Background.

In the March 1996 primary election, California's voters adopted Proposition 198, an initiative measure entitled the Open Primary Act, changing the state's primary election from a "closed" to what political scientists call a "blanket" primary. Proposition 198 passed overwhelmingly by a vote of 59.51 percent to 40.49 percent. Pet. App. 13a. California's blanket primary allows all voters, including independents, to vote for any candidate for any office regardless of the voter's or candidate's party of registration. § 2001. The top vote-getter of each party goes on to the general election. § 15451. Washington has had a blanket primary continuously since 1935, and Alaska has used a blanket primary since 1947, except for a period from 1960 to 1966. Opinion, Pet. App. 15a. Louisiana employs a variant, wherein the top two vote-getters, regardless of party, proceed to a run-off election. *Id.* By comparison, in an "open" primary any voter may request the ballot for *any* party, but is then limited to candidates from that party on the ballot. Pet. App. 14a-15a.

Prior to 1996, California had a classic closed primary, limited to voters who have registered as members of that party a specified period of time prior to the primary election. Only fifteen states have closed primaries of this kind. Opinion, Pet. App. 14a; Gerber Report, J.A. 111. Eight additional states have a "semi-closed" primary: participation is limited to those who have registered in

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"J.A." refers to the Joint Appendix; and "R.T." refers to the Reporter's Transcript.

the particular party plus independents. *Id.* Twenty-three states have an open primary, where participation is open to all registered voters, regardless of party affiliation. Any voter may select any party's ballot on election day. Gerber Report, J.A. 111.

According to a Los Angeles Times poll, Proposition 198 received a strong majority in every demographic subgroup: sex, age, race, education, political ideology, income, religion, and, most tellingly, party identification. J.A. at 104-106. In particular, 69 percent of Independents, 61 percent of Democrats and 57 percent of Republicans indicated they voted for the initiative, and the District Court found it likely that a majority of the members of minor parties also favored Proposition 198. Opinion, Pet. App. 13a; *also* Quinn, J.A. at 204.

As the District Court noted, California's Open Primary Act continues California's long history of political reforms begun in the Progressive Era. Opinion, Pet. App. 38a; *see* Alvarez & Nagler Report, J.A. 181-183. These reforms, most notably the initiative, cross-filing, and the direct primary, sought to empower citizens over special interests. "The Progressives believed that democracy should be something greater than competition between political parties. They viewed the direct primary as a vital weapon in their battle to 'make government accessible to the superior disinterestedness and honesty of the average citizen. [With the primary] . . . , it would be possible to check the incursions of the interests upon the welfare of the people and realize a cleaner, more efficient government.' [Citation.] We can imagine no government interest more compelling." *Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir. 1992). With Proposition 198, California voters ended

the century as they began it: by ensuring that citizens have a greater say over politics.

C. Proceedings Below.

Petitioners sued in early 1997 to enjoin enforcement of Proposition 198, J.A. 4-22, and the matter went to trial in mid-1997. The District Court received extensive expert testimony and documentary evidence from party officials, political scientists, campaign consultants and elections officials regarding the expected operation of California's blanket primary. This was based, in part, on experience in Washington and Alaska. On December 4, 1997, the District Court rejected petitioners' claims and entered judgment for respondents. Pet. App. 85a.

In ruling for respondents, the court rejected the claim that allowing non-party members to vote for candidates identified by their party on the primary ballot renders the blanket primary facially unconstitutional. Pet. App. 22a, 27a. The court noted that twenty-one states utilize open primaries allowing participation by non-party members, *Id.* at 14a, and under the political parties' theory, these primary schemes would also be unconstitutional per se. Rather, the court applied the "flexible" balancing test articulated by this Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), for assessing the potential impact of the blanket primary upon petitioners. Pet. App. 20a-21a. Petitioners asserted that the blanket primary will have a "destructive effect" on California's political parties, with crossover voting and raiding affecting the selection and behavior of nominees and party officials, weakening party discipline, increasing the cost

of primary elections, dampening the morale of party activists and disrupting internal party governance. *Id.* at 28a-29a. The court termed petitioners' characterization "overdrawn," *id.* at 29a, and found that the blanket primary will not diminish the efficacy or strength of political parties in California by "any substantial degree." *Id.* at 35a. The court did note a weakening effect of the party's ability to discipline legislators. Ultimately, the court concluded the blanket primary imposes a "significant but not severe burden on [the parties'] associational rights." Pet. App. 34a, 37a. Accordingly, the court noted that Proposition 198 need only be supported by interests that are important, but not compelling. Pet. App. 37a.

Notwithstanding that the state's interests need not be compelling, the court found those interests are indeed compelling. The court cited the reduction of partisan strife, increasing the representativeness of elected officials, giving voters greater choice and increasing voter turnout and participation in the primary process. Pet. App. 43a.

The Ninth Circuit reviewed de novo the constitutionality of the blanket primary and the District Court's determinations on questions of law and mixed questions of law and fact. *Id.* at 8a. After considering the record and briefs, on March 4, 1998, the Ninth Circuit affirmed and adopted the "careful, detailed and eloquent" opinion of the District Court as its own. *Ibid.*; 169 F.3d at 647-648.

On June 4, 1999, petitioners' petition for rehearing en banc was denied, with no judge on the Ninth Circuit requesting a vote on the petition. Pet. App. 87a. This Court granted certiorari on January 21, 2000.

D. Relevant Post-Trial and Post-Appeal Events.

Subsequent to the decision of the Court of Appeals, on July 13, 1998, the California Legislature proposed a measure to be placed on the ballot to "re-close" the presidential primary election. Resp. Lodging at 5-8. Known as Proposition 3, *id.* at 9-14, the voters rejected the measure 54 to 46 percent. *Id.* at 15-17. Partly as the result of that defeat, the Legislature again proposed a means to by-pass the blanket primary to allow for the selection of delegates for the presidential race according to national party rules. Senate Bill 100, approved and filed May 4, 1999, requires the Secretary of State to forward to the national political parties the results of the presidential race by voters registered in the respective parties. Resp. Lodging. at 1-4.

Elections held in June 1998 and March 2000 were conducted under the blanket primary. Relevant statements of the vote are provided in Respondents' Second Lodging.

SUMMARY OF ARGUMENT

This case presents a simple question: what is the purpose of a primary election? This Court has consistently held that primary elections are an integral part of the democratic process by which public officials are elected to administer government, a fundamentally public activity that narrows the field of candidates facing the voters. Primary elections are *not* the private activity of the political parties, beyond legitimate regulation by the citizens themselves. Because political parties receive

automatic ballot access and party identification for candidates, they are not simply private actors.

By passing Proposition 198, the citizens have asserted their own First Amendment interest in a more representative and participatory system of democratic governance. This case does not pit the parties' own associational interests against the regulatory interests of the state. Rather, it pits interests asserted by the parties' officials against the most fundamental First Amendment interests of party members themselves and of all voters. Strong majorities of every political party, as well as every demographic subgroup, approved the blanket primary. This Court should accord singular deference to the voters' and party members' decision to enhance the democratic process.

The associational interests of political parties are not absolute. *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 204-205 (1996); *Smith v. Allwright*, 321 U.S. 649, 659-660 (1944). Nonetheless, the political parties insist they can restrict candidate selection to voters who publicly affiliate with them – a belief which can only be premised on an unfettered right to limit candidate selection. As a consequence, states would have to run primary elections exactly as the political parties dictate. That defies both logic and common sense, allowing the parties to be the tail that wags the dog. The parties cannot be permitted to restrain the ability of the citizens freely and openly to participate in all stages of the electoral process.

In short, the political parties believe that the blanket primary is *per se* unconstitutional. They lean on this Court's decisions in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989), and *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), for the notion that they can select their standard-bearers by whatever means they want. The cases simply fail to support the parties' interpretation. *Tashjian* invalidated a closed primary restricting candidate selection. The blanket primary, by contrast, expands it. *Eu* concerned restrictions on internal party organization, not public elections, and *LaFollette* discussed only whether states could force a national political party to accept convention delegates in violation of its rules. As implemented, California's blanket primary does not run afoul of *LaFollette*: the state provides the national parties with separate tallies for the presidential primary by vote of party registrants.

Instead of a *per se* rule, this Court applies a flexible text whenever a political party claims an election law infringes on its associational interests. Articulated most recently in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the test weighs the "character and magnitude" of an alleged burden against the interests the state contends justify that burden. Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest; lesser burdens trigger less-exacting review. By this test, the political parties have failed utterly to demonstrate that the blanket primary violates their First Amendment associational interests.

The burdens asserted by the political parties were characterized by the trial and appellate courts as overdrawn, insubstantial or speculative. Theoretical harms, however, cannot be the basis of a facial attack.

The first of these burdens is crossover voting, including so-called "raiding," voting strategically to nominate the other party's weaker candidate. Nearly every expert agreed that "raiding" would seldom occur. The evidence firmly established the vast majority of voters who cross over do so sincerely in order to vote for the candidate they most prefer. The trial also established that crossover voting occurs in both open and closed primaries as well. In these other systems, moreover, crossover voters will cause more harm. Once voters ask for another party's ballot, they are locked into that ballot. They must cast their votes, if at all, among candidates they do not sincerely care for. Additionally, primaries with same-day registration are functionally no different from an open primary. Given the systemic similarities among blanket, open and some closed primaries, the California blanket primary is no more harmful to the political parties' interests than the primary election systems used by over half the states.

The political parties also failed to show that the blanket primary injures any of their traditional activities. Evidence of deleterious effects on party discipline or internal party governance was speculative and remote. Nor was any adverse effect shown on party campaign activities, financial support, registration, platform development and get-out-the-vote activities. Washington State's experience shows that the parties remain vigorous

in blanket primary states. *See, e.g.*, Olson Report, J.A. 138-143.

Additionally, minor parties suffer no special burden because of the blanket primary. Minor parties purport to engage in the primary process for expressive purposes. However, the state-run election process serves to select public officers, not to provide publicly-financed forums for political expression. Both the major and minor parties are free, of course, to completely control their nominating processes as completely private entities.

Turning to the state's concerns, the blanket primary advances numerous compelling interests. It undeniably promotes representative democracy, furthering political stability and governmental legitimacy. By allowing all qualified voters to vote in primary elections without restricting their choice or discriminating based on party affiliation, the blanket primary encourages greater voter participation and guarantees candidates will be more representative of the electorate and more broadly reflect the views of the voters. Indeed, millions of disenfranchised voters, including 1.5 million independents, will be able to vote. Data already show remarkable increases in participation in the first two blanket primary elections in California. The blanket primary also provides more choice for voters, expanded debate, enhanced voter privacy, and greater fairness.

Alone among the different types of primaries, the blanket primary represents the least drastic means available to promote the citizens' profound interests. These

interests – promoting broad-based electoral support of candidates, providing greater representativeness and increasing voter participation – are all, as the District Court put it, "interests of the first order." They aim to nourish democracy itself. Accordingly, this Court should affirm the judgment.

ARGUMENT

I. CALIFORNIA'S OPEN PRIMARY ACT IS A CONSTITUTIONALLY PERMISSIBLE EXERCISE OF THE PEOPLE'S RIGHT TO STRUCTURE THEIR ELECTIONS TO ENHANCE THE DEMOCRATIC NATURE OF THE ELECTION SYSTEM AND THE REPRESENTATIVENESS OF ELECTED OFFICIALS.

> The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allows.
> – Alexander Hamilton.

U.S. Term Limits Inc. v. Thornton, 514 U.S. 779, 795 (1995) (quoting 2 Elliott's Debates 257, in *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969)).

Hamilton's declaration is as true today as at the country's birth. In 1996 the citizens of California concluded that the "closed" primary used to select candidates for public office left popular elections far from "perfectly pure" and far too "bounded." California's closed primary system effectively disenfranchised millions of voters, producing government officials unrepresentative of the electorate at large. The voters overwhelmingly adopted Proposition 198, enacting a blanket primary to enhance the democratic nature of this State's election process and the representativeness of its elected officials. In doing so, California has joined the ranks of over half of the States of this nation which do not employ the traditional closed primary election.[3]

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[3] Washington, Alaska, and Louisiana have used the blanket primary for the past 50 to 65 years; 23 other states use various forms of the open primary, *see* Gerber Rept., J.A. 111-113; and some states, like New Hampshire, nominally use a closed primary but allow some or all voters to change registration at the polls, N.H. Rev. Stat. Ann. § 654:34(II)(b) (1996), thereby making the closed primary essentially identical to an open or semi-open one. Many of the states holding the earliest and most influential presidential primaries, for example, use one of these alternatives to the traditional closed primary. *See, e.g., id.* (New Hampshire); Va. Code Ann. § 24.2-530 (Michie 1997) (Virginia).

The presidential preference vote in California is subject to different election laws that do not bear directly on the issues in this case. Under §§ 15151, 15375 and 15500, as amended May 4, 1999, California provides presidential election results, including by party preference, to the national parties for their use in selecting national delegates according to their own rules. *See* Resp. Lodging. The focus of this case is on elections for state government offices and the Congress.

A. A Primary Election Is Part of the Public Process of Electing Officers to Administer Government, Not a Private Event.

This case presents two competing views of the role of a primary election. California's view, like that of the twenty-six other states that have adopted open and blanket primary elections, is that a primary is the first, critical step in the electoral process. The function of a primary election is to allow the citizens to choose their public officers, *see United States v. Classic*, 313 U.S. 299, 318 (1941), serving to narrow significantly the field of candidates for office. It is often the only opportunity to cast a meaningful vote. "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the political parties] have been made." *Morse v. Republican Party*, 517 U.S. at 205-206 (opinion by Stevens, J.).

The political parties argue that the primary is the culminating moment in the life of a private group. The parties maintain a primary's function is to pick a candidate who most clearly reflects the ideals of a party – not to elect the office holder or to narrow the field of candidates. On account of this claim they contend today that a blanket primary, and by implication, all open primaries and some closed primaries, are *per se* unconstitutional. However, it is too late in the day to argue that political parties are purely private entities with a right to absolutely control the states' primary elections. As this Court has recognized, "[t]he primary election . . . in California . . . is 'an integral part of the entire election process . . . [that] functions to winnow out and finally reject all but the chosen candidates.' " *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986)

(quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992). Because of the role the State confers upon political parties in the electoral process, a role they have accepted, they are public and governmental actors. Only political parties are given automatic ballot placement for their candidates, and only parties seek, as their ultimate goal, to obtain control of the levers of government. Pet. Brief. at 19.

B. The State's Power to Regulate Elections for Public Office Is a Fundamental Attribute of the State's Sovereignty and Its Democratic Character.

This Court has long recognized that the Constitution grants states "broad power to prescribe the 'Time, Places and Manner of holding Elections for Senators and Representatives,' art. I, § 4, cl. 1, which power is matched by state control over the election for state offices." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.' " *Burdick v. Takushi*, 504 U.S. at 433.

This court should accord particular deference to the voters' enactment in this case.[4] A State's sovereignty is

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[4] While the district and appeals courts did not rest their decisions on this ground, Opinion n.16, Pet. App. at 21a-22a, this Court is in a position to recognize that the political parties' membership approved of the blanket primary by voting for

defined through the structure of its government, particularly how citizens select those to govern. These decisions "go to the heart of representative government." *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991). Accordingly, the Framers intended for states to keep for themselves the power to regulate elections and prescribe the manner in which officials will be chosen, such power being inherent in the State's obligation to preserve the concept of a "political community." *Sugarman v. McDougall*, 413 U.S. 634, 647 (1973). "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature

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Proposition 198. In fact, 61 percent of Democrats and 57 percent of Republicans voted for the initiative and it is "likely that a majority of the members of [minor] parties also favored the initiative." Pet. App. 13a; J.A. at 104-106; *see also* Quinn, J.A. at 204. The district and appeals courts found these figures from the *Los Angeles Times* poll to be reliable, *id.*, and petitioners have not challenged their accuracy.

Since "[political parties] . . . exist to advance their members' shared political beliefs," *Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring in the judgment and dissenting in part) (citations omitted), their associational rights cannot be asserted to defeat their members' will. *Cf. Tashjian*, 479 U.S. at 236 (Scalia, J., dissenting) (recognizing primary as protecting "general party membership against . . . minority control" by party leadership, whose views may "diverg[e] significantly from the views of the Party's rank-and-file"). Just as the voters may override their legislative representatives through the initiative, party members have a right to override their officials through the same mechanism. If in conflict with the position of party leaders, the members' First Amendment right prevails. *Eu v. San Francisco Democratic Central Committee*, 489 U.S. at 226 n.15.

of their own machinery for filling local public offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970). It is axiomatic that "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

Moreover, the interests contending in this case are not classically those of the political party versus the State. The State's interests here are directly those of the people, the voters who approved of California's Open Primary Act. The case, then, pits the interests of the political parties against the voters' own First Amendment interests in a democratic system of government. *Elrod v. Burns*, 427 U.S. 347, 372 (1976). The interest of citizens in determining how they elect their government is fundamental. The courts ought not to disregard those interests, expressed through electoral reform, especially when those parties' members have themselves directed otherwise at the polls. The compelling interests of the State in this case spring ultimately from the citizens' own First Amendment interests in effective democratic government.

II. POLITICAL PARTIES DO NOT HAVE AN ABSOLUTE RIGHT OF ASSOCIATION WHEN PARTICIPATING IN PUBLIC ELECTIONS.

Respondents urge upon this Court the wisdom and foresight of the District Court when it carefully characterized the question it faced: *Is the parties' interest in limiting candidate selection to their own members so great that no matter what the State's interest and no matter how Proposition 198 will work, the blanket primary is unconstitutional on*

its face? Under this Court's decisions, the resulting answer must be no.

A. The Political Parties Do Not Have An Absolute Right to Restrict Who Can Vote in Selecting Candidates for Public Office.

The associational interests of political parties are not absolute. *Storer v. Brown*, 415 U.S. at 730. Yet the political parties here suggest that their interests in limiting candidate selection to voters who publicly affiliate with them is just that – absolute – and thus, the blanket primary, because it allows all voters to help select the final candidates, is per se unconstitutional. However, the claim that First Amendment rights may be implicated is the beginning of the inquiry, not the end of it.

The gravamen of the political parties' claim is that the First Amendment *requires* the State to run its primary elections exactly as the parties dictate. In such a regime the parties would be able to overthrow almost any state regulation of primary elections, even rules requiring them to nominate by direct primary, to accept votes from party members that the parties may want to exclude, and to count only registered voters' votes.[5] Courts have

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[5] Such possibilities are not hypothetical. At trial, Gail Lightfoot of the Libertarian Party, testified that: "[i]n California . . . state law says that all registered voters that take the name Libertarian are members of the party. But we consider pledge-signing individuals who have paid their dues and signed the pledge to be the true members of our party." R.T. 154. The parties' reasoning would give the Libertarian Party the right to restrict voting to its "true members." Similarly, the Peace and Freedom Party confers membership on persons who are "deprived of the right to vote by the State of California because of age, citizenship, or prior social behavior." R.T. 179. The logical consequence of this claim is that if the party insists, the State must allow minors, felons and noncitizens to vote in the primary.

already rejected such arguments. *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. at 919 (upholding direct primary over party's objection); *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down party's exclusion of blacks from primary). When they engage in the nominating process, established political parties are subject to a wide range of state regulation, *see Morse v. Republican Party*, 517 U.S. 186; *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157-58 (1978), and do not have unfettered control over who can vote in primary elections, *see Terry v. Adams*, 345 U.S. 461 (1953).

Moreover, such a right would place an unmanageable burden on the states. They would have to tailor primary requirements to every party's wishes. States would have to run a primary election where the Republicans want a completely closed primary; the Democrats a completely open one; the Libertarians, one open to themselves, Independents, and Democrats, but not to Republicans; the Peace and Freedom Party a blanket primary; and still another party a primary open only to members pledging to vote for the eventual nominee. This approach would quickly turn the primary to chaos, particularly when the parties' desires conflict. *Green Party v. Jones*, 31 Cal.App.4th 747, 759, 37 Cal.Rptr.2d 406, 414 (1995) ("Even little variations [in primary procedures], if they are capable of multiplication at the behest of political

parties[,] contain the seeds of an elections procedure Babel.").

B. The Cases Cited by the Political Parties Do Not Support Their Theory of an Absolute Right to Restrict Who Can Vote in Selecting Candidates for Public Office.

The parties cite three Supreme Court cases as supporting this argument, *Tashjian v. Republican Party*, 479 U.S. at 208, *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989), and *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981). None of these decisions in fact supports the political parties' position.

For example, they quote language from *Tashjian* that refers to the constitutional protection given a political party to "determin[e] the boundaries of its own association" and the "basic function" of selecting the "Party's candidate," suggesting that it is the political party that sets the rules governing who votes in a state's primary election. Pet. Brief at 24-27. Therefore, it is said, Proposition 198 "trenches" on the parties' associational rights. Pet. Brief at 24. In fact, *Tashjian* bolsters rather than undermines Proposition 198.

As the Alaska Supreme Court succinctly put it: "*Tashjian* does not confer *per se* validity on party rules which conflict with a state's primary election laws. Indeed, it disavows any such scope: 'Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership.' 479 U.S. at 224 n.13, 107 S. Ct. at 554

n.13." *O'Callahan v. State of Alaska*, 914 P.2d 1250, 1259 (1996) (upholding Alaska's blanket primary election law).

In *Tashjian*, Connecticut State Democratic officeholders blocked Republican attempts to allow independent voters to participate in the Republican primary. 479 U.S. at 212-213 n.4. In considering whether Democrats could act through the State to bar Republicans from expanding their electoral base, the Supreme Court carefully defined the associational interest at stake. The Republican Party's interest, it held, was not in generally determining who could participate in the selection of its candidates, but specifically in preventing that group of voters from being "limit[ed.]" The Court wrote:

> The [Connecticut] statute . . . places *limits* upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The state *thus limits* the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Tashjian, 479 U.S. at 215-216 (citations and footnote omitted) (emphasis added). *See also Timmons*, 520 U.S. at 360 (reiterating narrow scope of *Tashjian* when rejecting a challenge to Minnesota's anti-fusion statute).

Tashjian hardly holds the parties' associational interest to be a sweeping right to control who may vote in primaries. Rather *Tashjian* and *Timmons* identify the interest more specifically as one *against* having the party's electoral base restricted contrary to the party's wishes. As *Tashjian* notes, limiting those to whom the party may

appeal for support impairs the party's "appeal to common principle [which] may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 216. The interest runs not to the party's right to control who can participate in a critical step of the electoral process, but instead to the ultimate competitiveness of these candidates in the *general* election. The State does not have a right – over a party's objection – to *limit* the range of voters to which a primary candidate can appeal. By opening up the primary, however, Proposition 198 vigorously promotes, not impairs, this interest.

Second, the parties' also cite *Eu*, 489 U.S. 214, which likewise fails to support their claims. In *Eu*, the Supreme Court struck down a statute prohibiting parties from endorsing candidates in primaries and dictating the organization and composition of party governing bodies. The case did not involve who could vote in primaries, but only whether parties could speak to their members and manage their internal organization as they thought best – areas Proposition 198 carefully avoids.[6] Indeed, the Court noted that a party's interest in controlling its internal organization was much different from *and stronger than* the party interests at stake in the primary election in *Tashjian*. *Eu*, 489 U.S. at 230.

Finally, *LaFollette*, 450 U.S. 107, concerns not whether a State may choose a particular primary system over a political party's objection, but only whether a State can

[6] Under Proposition 198, election of party central committees remains limited to voters registered in each party. § 13300.

force a national party to accept convention delegates chosen in violation of the party's rules. *LaFollette*, like *Cousins v. Wigoda*, 419 U.S. 477 (1975), rests heavily on the special nature of national party conventions, which formally govern the party's internal affairs, implicate interests beyond the reach of any individual state, and reflect the need for national uniformity in our one single national race – that for President and Vice-President. This interest of the national parties is not implicated here. Under the California Elections Code, as amended May 4, 1999, presidential primary results by party vote are forwarded to the national parties for national delegate selection according to the national parties' own rules. *See* n.3, above.

Additionally, *LaFollette* did not overturn Wisconsin's open primary law. "The question in this case is *not* whether Wisconsin may conduct an open primary election if it chooses to do so." 450 U.S. at 120 (emphasis added). This Court then noted that the Wisconsin Supreme Court "may well be correct" that "the open primary serve[s] compelling state interests by encouraging voter participation." *Id.* at 120-21. This Court acknowledged Wisconsin has a substantial interest in the manner in which its elections are conducted and that that interest was not incompatible with the national party's interest – both interests could and would be preserved. *Id.* at 126.

C. Instead of Employing a *Per Se* Rule, This Court Has Provided a Flexible Test That Weighs the Burdens on Political Parties' Associational Interests Against the Reasons Justifying the Election Law.

This Court applies a flexible standard of review to state election laws challenged by a political party on the basis of the First Amendment. When deciding whether a state election law violates First and Fourteenth Amendment associational rights, a court:

> weighs the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less-exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable nondiscriminatory restrictions." No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (citations omitted) (citing *Burdick v. Takushi*, 504 U.S. at 434; *Anderson v. Celebrezze*, 460 U.S. 780, 788-789 (1983) and *Norman v. Reed*, 502 U.S. 279, 288-289 (1992)). Moreover, the Court does not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Id.*

Thus, this Court has *not* employed the *per se* rule urged by the political parties, nor does it routinely apply strict scrutiny whenever a political party alleges its associational interests are impaired by a state's election process. As the District Court noted: "[i]t is necessary to look beyond the parties' claim that their constitutional interest in limiting candidate selection to their respective members necessarily prevails over any State interest and without regard to how the voters may behave under a blanket primary." Pet. App. at 27a.

III. UNDER THIS COURT'S FLEXIBLE TEST, THE POLITICAL PARTIES FAIL TO DEMONSTRATE THE BLANKET PRIMARY VIOLATES THEIR FIRST AMENDMENT ASSOCIATIONAL INTERESTS.

When this Court's test in *Timmons* and *Burdick* is applied, it soon becomes apparent that the political parties' First Amendment rights of association have not been violated. The burdens they alleged were found to be speculative and, in most cases, insubstantial by the District Court; the reasons justifying the blanket primary were found to be strong and compelling; and the blanket primary was found to be the "perfect fit," tailored precisely to meet the compelling interests of the electorate. Pet. App. at 29a-37a, 42a-43a. The parties ignore or minimize the findings of the District Court, because, once this Court's test is employed, they cannot substantiate the constitutional violation they assert.

In the political parties' brief, except as to the minor parties, they fail to present this Court with any of the

burdens or harms they will suffer as the result of the blanket primary, other than to say that the primary is "intrusive into party associational rights because it denies the very existence of those rights." Pet. Br. at 33. In other words, they return to the notion of a *per se* violation. However, respondents will assume for the purposes of this argument that the political parties continue to rely on the harms and burdens they suggested at trial and on appeal. It was clear then, and clear now, that the political parties simply do not suffer the burdens they asserted below as the result of California's Open Primary Act.

A. The Political Parties Assert Burdens That Are Insubstantial or Speculative.

The parties asserted they will suffer a range of harms – from "strategic voting" to impairment of women's and racial minorities' voting power. The District Court found these assertions without any basis in fact and largely rejected them as speculative, falling far short of adequate proof. Opinion, Pet. App. 29a-30a, 32a-33a. In doing so, the court followed the lead of both this Court and other courts. *See, e.g., Timmons*, 520 U.S. at 361 (rejecting speculation and "predictive judgment"); *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d at 832 (rejecting expert's opinion as based upon speculation, not fact). The District Court's finding that the parties offered little evidence that the asserted dangers will occur are findings of fact that should be afforded deference by this Court.

By contrast, respondents presented substantial evidence as to how the blanket primary has operated in Washington for the past 60 years. *See* Olson Report, J.A.

at 138-149; Pet. App. 29a-31a. The political parties refuted none of this evidence. Indeed, at trial, they and their experts repeatedly acknowledged a lack of familiarity with how the blanket primary has operated in Washington and Alaska, the functional experience most relevant to this case. R.T. 62, 192, 226, R.T. 583-584.

1. The Political Parties Demonstrated No Burden from Crossover Voting, Including So-called "Raiding."

The parties failed to prove that "crossover" voting will burden parties. As the court below correctly concluded, "the parties' characterization of the likely amount or effects of crossover voting due to a blanket primary is overdrawn." Pet. App. 29a. A crossover voter is someone who votes for a candidate of a party in which the voter is not registered. Crossover voters have been variously described as "sincere," "strategic" or "raiders." *Id.* at 28a-29a. The parties complain most of the so-called raider, who mischieviously switches sides to vote for the candidate perceived weakest in another party. However, while the parties' witnesses testified at length as to how raiding *might* occur, not a single expert produced any evidence that raiding is in fact a problem in open or blanket primary states. Quite the contrary, their testimony proved how difficult raiding would be.[7]

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[7] Successful raiding requires highly specific electoral conditions, accurate information, secrecy, and the money and means to pull it all off. In particular, the experts agreed that in order for raiding to even be a possibility: (1) the raider's own primary must be uncontested; (2) the race in the opposing party

Given the real-life complexity of political campaigns, the District Court found "almost unanimity" among the experts that there is little evidence raiding will be a factor in California's blanket primary. Pet. App. 29a; R.T. 401, 404, 475, 485-486, 515, 594, 774. This finding confirms the conclusion reached by every court that has addressed the issue. *Tashjian*, 479 U.S. at 219 n.9; *LaFollette*, 450 U.S. at 122 n.23; *O'Callaghan v. State*, 914 P.2d 1250, 1261 (Alaska 1996) (upholding Alaska's blanket primary); *State ex rel. LaFollette v. Democratic Party*, 287 N.W.2d 519, 533 (Wis. 1980), *rev'd on other ground, Democratic Party of the United*

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must be tightly contested; (3) the raider must be able to tell which candidate in the target party will be weakest in the general election; and (4) the raider must be part of a concerted action. *See* Olson Report, J.A. 137; R.T. 518, 425. Each link in this chain is problematic and speculative.

Partisan activists must cross over and vote for a candidate they find most objectionable. R.T. 315. Additionally, it is difficult for even political consultants, let alone voters, to predict accurately in the spring which of several candidates in the target party will be weakest in November. R.T. 338. In 1966, for example, Democratic Governor Pat Brown's advisers thought that Republican Mayor George Christopher would be his strongest opponent in the general election and so did everything they could to help Christopher's opponent in the primary: Ronald Reagan. R.T. 338. The information and analysis required for raiding is generally not available to the average voter. R.T. 545. Finally, any large-scale attempt to manipulate voters is usually quickly disclosed, and then backfires on the manipulators. R.T. 80, 252, 254, 282, 869. Professors Alvarez and Nagler concluded that less than 2 percent of voters ever engage in raiding and that the blanket primary will not lead to large amounts of strategic behavior by voters, most of whom will not have the information necessary to engage in such behavior. J.A. 169-170.

States v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (U.S. Wis. Feb. 25, 1981).[8] The District Court's finding can hardly be overturned as clear error.

The parties' own experts acknowledged that the vast majority of voters who cross over do so simply to vote for the candidate they most prefer. R.T. 451, R.T. 486 (90 to 95 percent of crossover voters are voting for the candidate of

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[8] At trial, expert testimony concerning two Washington elections demonstrated raiding is unlikely to occur. Petitioners' expert Sal Russo was a political consultant to Republican George Nethercutt, who defeated Speaker of the House Thomas Foley in 1994 – the first time a sitting Speaker had been defeated in 50 years. R.T. 310. Russo testified that conditions in this race were "ripe" for raiding: Foley was unopposed and well-financed, and Nethercutt, one of three candidates seeking the nomination, was a relative newcomer but already identified as Foley's strongest potential challenger. R.T. 320-323. However, the Democrats made no attempt to raid the Republican primary and set up a weaker opponent, principally because Foley did not want to lose his base and lower his own showing in the primary. R.T. 324.

The 1996 Washington presidential primary was also "perfectly positioned" for raiding: President Bill Clinton was unopposed, leaving Democrats free to cross and select the perceived weakest opponent among eight Republican contenders. Olson, J.A. at 210-213. Fortuitously, Washington was offering voters two primary ballots to choose from: a closed primary to be used by the parties in selecting delegates to the national conventions, and the state's traditional blanket primary open to all voters. This unique situation provided political scientists with a "laboratory" to directly measure crossover voting in simultaneous closed and blanket primaries under conditions conducive to raiding. *Id.* The results showed no evidence of significant crossover voting. Votes cast in the blanket primary were substantially the same as those in the primary closed to nonparty members. *Id.*

their choice). These are the "sincere" crossover voters, who have no intent to create mischief. R.T. 15-18, 56, 59, 349-350, 496-457. Further, the evidence showed that crossover voting generally does not change the outcome of elections, it merely accentuates the margin of victory. Pet. App. 31a; R.T. 488. The parties admitted that crossover voting makes little difference if it does not change the outcome of the election.[9] R.T. 234, 468.

Furthermore, crossover voting in open or even closed primary systems will actually have a more pernicious impact than in a blanket primary. As petitioners' expert Sal Russo testified, some races will have such appeal that no matter what the form of primary and what the registration requirements, voters will cross party lines for that one vote. R.T. 290 (Armenian-Americans supporting Governor George Deukmejian "would have done anything, whether it was an open primary, blanket primary. I mean, they would have been there hell or high water.") And nominally closed primary systems allowing same-day registration make such crossover voting as easy as under

[9] The District Court observed that, "in the fullness of time," it is likely some primary races will be determined by crossover voting. Pet. App. 32a-33a. However, the parties cited only three races in the past 60 years under the Alaska and Washington blanket primaries which arguably were determined by crossover voting: Washington Governor Clarence Martin in 1936, Alaska Governor J. Hammond in 1974, and Washington Governor Dixie Lee Ray in 1976. *In each instance, the nominee went on to win the general election, giving the voters their candidate of choice.* Olson, J.A. at 207-210, 213. The evidence at trial confirmed that voters generally nominate and elect their most preferred candidate.

an open primary system. Under the closed or open primary, once voters cross party lines for the one race of interest, they are *locked into the other party's ballot* for all other races. They are faced with the choice of not voting, voting for candidates about whom they have no knowledge or interest, or voting mischievously. By contrast, a blanket primary allows voters to vote their sincere choice race-by-race, regardless of party.

This Court thus has the opportunity to recognize what the evidence at trial established: crossover voting occurs in *both closed and open primaries*. Pet. App. 31a-32a; Alvarez & Nagler Report, J.A. at 162-164, 173; R.T. 239, 466; *see Burdick v. Takushi*, 504 U.S. at 449 (Kennedy, J., dissenting). Accordingly, the parties' claim that any crossover votes – votes of "outsiders" and "nonmembers" – make a primary *per se* unconstitutional would invalidate not only the blanket but the open primary and some forms of the closed primary as well.

2. The Political Parties' Arguments on Crossover Voting Would Strike Down Not Only Blanket Primaries, But Open Primaries and Many Forms of the Closed Primary.

" 'The distinctions between open and closed primaries are easy to exaggerate. Too simple a distinction ignores the range of nuances and varieties within the closed primary states.' Similarly, there are many variations within the open and blanket primary states." Opinion n.8, Pet. App. at 14a (internal citations omitted). For example, "[i]n an open primary, a registered voter may

request, on election day, the ballot for any party's primary in which the voter intends to vote, *whether or not the voter previously has registered as a member of that party*; . . . Twenty-one states have an open primary in this sense of the term." *Id.*, citing Gerber Report, J.A. 111-113 (emphasis added; Gerber Report actually refers to 23 such states). The record in this case shows that some states do not require voters to identify their party affiliation; others do not require public recordation of a partisan ballot selection; and some states give the voter a choice whether to affiliate publicly. Indeed, this Court faced the relevance of a non-recordation law in Wisconsin in *La Follette, supra.*[10]

When a state permits a voter to obtain a party's ballot but not disclose his or her party affiliation or have it recorded, the alleged "harms" that arise are identical to those the political parties allege arise from the blanket primary – the party has no way of knowing whether the voter supporting their candidate is "one of theirs." As Justice Powell noted in *Rosario v. Rockefeller*: "[c]itizens customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations," 410 U.S. 752, 769 (1973) (Powell, J., dissenting), not because they want to participate in the life of an organization. Unlike joining a private organization, voters do not have to pay dues, take an oath, attend meetings or even express agreement with certain ideals or goals. "Thus, to

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[10] At trial, the political parties complained their real fear was a primary election system which does not require *recordation* of party affiliation. R.T. 122, 139-142.

contend that Proposition 198 permits non-pa. ty members to vote in a party's primary, while accurate, covers over much of the imprecision in the political reality." Opinion, Pet. App. at 26a-27a. In open primary states, in states where voter registration is not required or recorded, and in "semi-open" and "semi-closed" states where the voter may request any ballot on the day of the primary, *see* Opinion, Pet. App. 15a n.9, essentially *any* voter may obtain *any* party's ballot on the day of the primary and "switch" parties, or cross over, with ease. Such an election system is functionally no different from a blanket primary, where a voter may make (or decline to make) that choice, on a race-by-race basis. Under these circumstances, the consequence of accepting the political parties' arguments on crossover voting jeopardizes almost all forms of primaries currently in use.

3. Proposition 198 Does Not Burden Parties' Traditional Activities.

At trial and on appeal, the political parties argued that the blanket primary severely burdens traditional party activities such as internal party governance, maintaining party discipline in the Legislature, selecting candidates, and conducting campaigns. Now, in the Petitioners' Brief, they make no mention of these burdens. The burdens were, and remain, speculative at best and not substantial in any case.

First, there is no demonstrated impact on internal party governance. Proposition 198 expressly exempts party central committee positions from the blanket primary. The parties, however, argued below that because

both the Republican and Democratic Parties currently permit their nominees to serve on and make appointments to their central committees, these governing bodies will become "adulterated" by nominees who win by virtue of outside support. Evidence refuted these claims. First, all nominees must be members of the party, § 8001, and their appointees as well. R.T. 85. Second, nothing prevents the parties from changing how their central committees are constituted. R.T. 221. Third, nothing suggests that nominees who win with crossover votes will be less dedicated to party ideals and activities. R.T. 236. Fourth, this scenario exists in the closed primary as well, where a candidate can also receive the nomination with less than majority support from party members. R.T. 75. Finally, the parties' present rules belie their objections. Those rules give candidates who win in the *general election* more appointments to the central committee *in recognition of their demonstrated ability to appeal across party lines.* R.T. 225.

Second, the political parties asserted that the blanket primary reduces the "disciplining effect" of parties upon elected officials, making it easier for members of the Legislature to break from the parties' positions on issues. R.T. 213. Yet petitioners acknowledged that even under the closed primary many elected officials, especially those from competitive districts, voted against their party leadership. R.T. 351. This is a harm only if the party has a greater claim to the candidates than do the constituents. Finally, the balance struck between party caucus discipline and permitting legislators to "vote their districts" is a question of public policy and it is not the function of any court to resolve them.

Third, the parties also claimed that the blanket primary will cripple their campaign activities. But Proposition 198 does not affect parties' participation in campaigns at all. Parties can develop platforms, register new voters, endorse candidates, provide financial support, and conduct get-out-the-vote activities on election day exactly as they could before. Opinion, Pet. App. 36a; R.T. 225. Indeed, the testimony showed that under Washington's blanket primary political parties remain strong and continue to robustly conduct all these activities. Pet. App. 36a; R.T. 527.

Fourth, the parties argued below was whether Proposition 198 will produce "false candidates" who will carry the party's label but not its politics. R.T. 365-366. But, party candidates must be party members, § 8001, and parties can endorse preferred candidates if they wish. *See Eu*, 489 U.S. at 223-224. Parties even have the power to impose certain tests on those who would run under their banners. *See Duke v. Smith*, 13 F.3d 388, 391, fn.3 (11th Cir. 1994). In any case, courts have noted that the state's interest in limiting the *candidate's* ability to switch parties is greater than any interest in limiting the *voter's* ability to switch parties. *Storer*, 415 U.S. at ___; *Pontikes v. Kusper*, 345 F. Supp. 1104, 1108-1109 (N.D. Ill. 1972). Petitioners simply failed to show how the blanket primary would increase the risk of false candidacies.

Finally, the blanket primary does not undermine the parties' ability to define their membership. In California, both before and after Proposition 198, citizens become members of parties simply by registering to vote as members of that party. §§ 2151, 7164, 7362, 7804, 8001. It is a self-designating system. At trial, no one even hinted that

the parties vet their members. Even the extremely partisan Libertarian and Peace and Freedom Parties accept as members those who register with their parties. Under the blanket primary, none of this changes.

4. Minor Parties Suffer No Special Burdens In the Blanket Primary.

Petitioners present in their brief an argument that the blanket primary imposes a particularly severe burden on the minor parties. Pet. Br. at 33-38. The principal burden identified is the support minor party candidates will receive from "nonmembers." *Id.* Indeed, it becomes clear that these parties do not welcome support from the voters, but instead wish to use the state's primary election system as a tool to conduct their internal struggles *absolutely free of any voter who sincerely decides that on election day he or she wishes to support their candidate.* Even if voters wish to support, for example, Peace and Freedom candidate X, the message from the party is that such votes are not only not welcome, but, in order to support X, voters must publicly affiliate, even against their own wishes, in the Peace and Freedom Party and severely restrict the choices available to them at the primary. The voter is given no real choice at all – precisely what Proposition 198 was designed to overcome.

It is apparent, then, that the minor parties either engage in the election process because they genuinely want to win the election, in which case, they cannot complain about support from the voters, or they engage in it for expressive purposes. In the latter case, while expressive interests are significant, they fail to rise to the

level of protected associational interests in elections. *Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as fora for political expression."); *Burdick*, 504 U.S. at 438 ("[T]he function of the election process is to winnow out and finally reject all but the chosen candidates. . . . Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.") (internal citations and quotation omitted). In any case, even if elections were the proper forum for expression, it is difficult to see how the minor parties' rights of expression will be harmed by more exposure, greater opportunity and broader support in a blanket primary.

Notwithstanding petitioners' claims, the harms to the minor parties alleged are speculative and insubstantial. The District Court found that nothing suggests that crossover voting will be widespread, much less have a negative effect on the minor parties or their candidates for several reasons. Pet. App. 32a n.26. First, minor parties seldom have contested primaries. In the approximately 2,000 partisan primary races in which minor parties have fielded candidates since 1968, only 102, approximately 5 percent, have been contested. Moreover, of those 102, 34 occurred in 1970 as the result of a factional dispute within the American Independent Party. R.T. 618, 630-631. Furthermore, minor parties in California field candidates in partisan elections primarily to recruit members and to spread the message of the party. There is very little likelihood of harm by sincere crossover voting, let alone raiding. R.T. at 427. The interest minor parties have in elections is largely an expressive one.

The experience of minor parties in Washington does not support the minor parties dire predictions. Before Proposition 198, California had six ballot qualified minor parties. R.T. 610. From 1988 to 1996, Washington ranged from a low of four to a high of eight – about the same number. In *Munro*, 479 U.S. at 197-198, this Court observed that Washington has a "blanket primary," where minor party candidates are free to campaign among the entire pool of registered voters. It presents no bar to "get the vote out," foster candidate name recognition, and educate the electorate. *Id.*

Finally, it is worth noting the political parties may avoid the burdens they fear. Both the major and minor parties are free to support and nominate candidates through the independent candidate approach, by using nominating petitions. § 8400 et seq. Like any private entity, they can chose their candidates by private primary, convention, caucus or any other method. *See Green Party v. Jones*, 31 Cal.App.4th 747, 755 n.9 (1995). However, if they do so, they forfeit automatic ballot access and party identification for candidates.

B. The Blanket Primary Advances Compelling State Interests.

California's voters – Republicans, Democrats, independents and others – voted overwhelmingly to adopt a blanket primary, believing it will give voters more choice, increase voter participation, make elected officials less partisan and more responsive to the voters, wrest control of government from special interest groups, and restore vigorous political competition. J.A. 89-90, 95, 104-106.

These interests, fundamental to a healthy democracy, are powerful and compelling.

Under this Court's balancing test, the state need only justify the blanket primary by showing that it advances important regulatory interests, *Timmons*, 520 U.S. at 364; *Burdick*, 504 U.S. at 434, "sufficiently weighty to justify the limitation imposed upon the Par[ties'] rights." *Timmons*, at 364. The District Court found the state's interests "need not be compelling, given that the burdens are not crushing, but they must be important." Pet. App. 37a. That court, in turn, found, "taken as a whole, the State interests that support the blanket primary are substantial, and indeed compelling." *Id.* at 42a. Of these interests, the District Court went on to say, "[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout *are all interests of the first order.*" *Id.* at 43a.

1. The Blanket Primary Will Produce Elected Officials Who Better Represent The Electorate.

The blanket primary advances one of the most important goals of any election process: securing the representativeness of elected officials. As this Court has long recognized, the state may regulate the election process to assure that elections effectively translate the will of the electorate. *Storer*, 415 U.S. at 732. The State may, for example, insist that candidates demonstrate a significant level of voter support before qualifying for the general election, *American Party of Texas v. White*, 415 U.S. 767, 782 (1973); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), and

require that the election process be democratic even against the wishes of the political party. *Tashjian*, 479 U.S. at 237 (Scalia J., dissenting).

Greater representativeness also helps maintain the stability of the political system. *Storer*, 415 U.S. at 736, and the state has a valid interest in preserving the integrity of the electoral process. *Rosario v. Rockefeller*, 410 U.S. at 761. But an electoral process can hardly have integrity if it does not ensure that the officials elected are representative of the people to be governed. Put simply, the less a voter staggers from election to election picking between candidates who do not reflect the voter's views, the more stable the overall political system will be. *See Rutan v. Republican Party*, 497 U.S. 67, 107 (1990) (Scalia, J., dissenting) (finding that when "each party has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream . . . , the stabilizing effects are obvious [and] . . . splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government are avoided.").

The record demonstrates that officials elected under blanket primaries stand closer to the median policy positions of their districts than do those elected under closed primaries. Gerber, R.T. 693-696. The closed primary, by contrast, limits voters in the general election to picking among candidates selected by a much narrower subset of voters not reflective of the total electorate. By affording all voters the opportunity to consider all of the participating candidates at two points, the blanket primary generates election outcomes that are more closely aligned with

true voter preferences. *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (observing that expanding choices in an election fosters the voter's ability to express political preferences). As the District Court found: "[T]he people of California agree that a blanket primary system will lead to the election of more representative 'problem solvers' who are less beholden to party officials and 'special interest groups.' " Pet. App. 41a.

Unable to deny that the blanket primary will produce candidates more representative of the electorate, the parties have characterized this virtue as a vice. According to them, candidates closer to the political fringe would be better because they provide voters a more "meaningful choice." R.T. 412-413, R.T. 561-562. But the parties confuse stark choices with meaningful ones. The parties' argument mistakenly takes the distance between the candidates themselves, not the candidates' closeness to the voters, as the measure of a healthy political system. R.T. 412, 413, 561, 562. As two of the parties' experts conceded, this view of "meaningful choice" reflects a European, not an American, model. R.T. 412, 413, 580, 581, R.T. 945. In contrast, the blanket primary promotes the fundamental principle of representative democracy that voters be allowed to vote for the candidate they actually prefer. *See United States Term Limits v. Thorton*, 514 U.S. 779, 780 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)). Voters hope to find a candidate on the ballot who reflects their preferences on issues. *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

The blanket primary aims not to produce more "moderate" candidates, but rather candidates who are *more*

representative of the electorate. As most of the electorate lies near the center of the ideological spectrum, the more representative candidate will often appear the more moderate. However, "reflective" and "moderate" are not synonymous. The political parties' own experts pointed to numerous candidates who benefitted from crossover voting who are not "moderates": George Wallace, Eugene McCarthy, Gary Hart, Ronald Reagan, and Jerry Brown. R.T. 292-294.

2. The Blanket Primary Affords Voters More Choice.

In passing proposition 198, the voters acted on a clear understanding that the blanket primary would afford each individual voter more choice. Under a heading reading "Give Voters A Choice," the ballot pamphlet expressed in definite and comprehensible terms that the blanket primary would enable "every voter to select the best candidate for each office, regardless of party affiliation." This is a right held by "each American, not by Americans en masse." *Nixon v. Shrink Missouri Government PAC*, ___U.S.___, 120 S. Ct. 897, 922 (2000) (Thomas, J., dissenting). Each individual voter should have a full franchise in this democracy. However, as the result of the "skewing" in the closed primary process toward more unrepresentative candidates, candidates who might otherwise command majorities at the general election are unable to prevail at the primary. Thus, "voters at the general election are forced to pick among candidates none of whom is the first choice of the majority of voters." Opinion, Pet App. at 40a-41a; R.T. 255-256,

954-963, 974-975. The blanket primary, however, overcomes this impediment to full voter choice.

Astonishingly, petitioners at trial offered evidence that greater voter choice was a shortcoming. Professor Martin Wattenberg argued against giving voters more choice because it would only inure to the benefit of a small minority that "will really be able to make good use of those extra choices, and those are the people that are well educated, well informed, politically active. And those are the people that already have disproportionate power." R.T. 576. He even suggested that because of their "political ignorance," women, blacks, the poor, and the young would not be able to take full advantage of the choices provided to them by Proposition 198. R.T. 592. California's voters – including women, minorities, the poor and the young – did not share this opinion. Proposition 198, it is worth repeating, was supported by a majority of every demographic subgroup – including groupings by sex, race, age, income and education. Opinion, Pet. App. 13a.

3. The Blanket Primary Provides An Effective Vote To Disenfranchised Voters.

The blanket primary will give millions of citizens a more effective vote. California's closed primary effectively disenfranchised all independent voters and one-quarter of the State's party voters by denying them real participation in a critical step of the election process. Opinion, Pet. App. 39a-40a. At the time of trial, independents, or "decline to state" voters, were 1.5 million voters, or 11% of California's electorate; this is increased

to 14% subsequent to appeal, *see* Resp.'s Second Lodging. Others live in districts "safe" for another party. In California, a majority of congressional, state senate and assembly districts are considered safe for one party. R.T. 851-852. Thus, they could not vote in the primary in any way that mattered in deciding who would eventually represent them. This Court has noted the political disadvantages suffered by such voters in safe districts.[11] *Davis v. Bsandemer*, 478 U.S. 109, 170 (1986) (Powell, J., concurring and dissenting.)

The blanket primary also empowers party members who belong to minority parties in districts safely held by another party. Approximately one-quarter of all of California's voters fall into this category, effectively disenfranchised by having no say in the election of their governmental officials. Opinion, Pet. App. 40a; R.T. 858. The blanket primary is significant for these party members. It allows them a meaningful say in who represents them without also forcing them to abandon their political affiliation. Pet. App. 40a. Even the political parties'

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[11] It is no answer to suggest, as have the political parties, that these voters could register in the dominant party in order to gain an effective vote. Forcing voters to choose between retaining their true party affiliation (or non-affiliation) and participating in the dispositive election for most offices is simply unacceptable. Such a choice imposes a "substantial burden" on the voter. *Burdick*, 504 U.S. at 444, (Kennedy, J., dissenting) (requiring independent to register as partisan in order to participate in dispositive primary elections of the dominant party represents a "substantial burden"); *see also Bullock v. Crater*, 405 U.S. 134, 146 (1971) (unreasonable to require that candidates and voters abandon party affiliation in order to avoid primary filing fee).

experts acknowledged that the blanket primary opens up a determinative stage of the electoral process to voters who previously had no real say in the choice of their representative. Some 3.5 to 4.4 million additional voters can now participate fully in the selection of the person who will represent them in government. R.T. 239-240.

4. The Blanket Primary Increases Voter Participation.

In the last two primary elections, in 1998 and 2000, the first conducted under the blanket primary, a dramatic increase in voter participation occurred.[12] Resp.'s Second Lodging. In fact, in the March 2000 election, California experienced the highest voter turn-out in a primary election in 20 years. During the thirty years prior to the blanket primary's adoption, California had witnessed a 15-20 percent *decline* in voter participation in both primary and general elections. Mervyn Field, J.A. at 201; R.T. 658, 661-662. The evidence at trial established that the blanket primary will counteract this decline by encouraging voter participation at both stages of the election.

The political parties conceded at trial that allowing 1.5 million independent voters in the blanket primary boosts participation. R.T. 372; also Field, J.A. at 202; R.T. 658-659. So too, increasing the number of candidates and

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[12] Respondents have lodged with the Court the publicly-recorded votes in the most recent two primary elections in California conducted under the blanket primary, both occurring subsequent to the litigation in this case, namely June 1998 and March 2000. Resp.'s Second Lodging.

the competitiveness of elections will increase voter turnout. Opinion, Pet. App. 42a; *see* Field, J.A. at 202; *also* Nagler, R.T. 954. Empirical evidence confirms this prediction. Professor Gerber found that other blanket primary states exhibited the highest levels of turnout, open primary states the next highest levels, and closed primaries the lowest turnout. R.T. 682. In the 1996 congressional races, for example, California experienced a 43.90 percent turnout rate, compared to the 55.81 percent voter turnout average observed in the blanket primary states. The evidence at trial and afterward is undeniable that the blanket primary promotes voter turnout.

5. The Blanket Primary Expands Debate.

By definition, the blanket primary provides voters a wider range of choices. This, in turn, compels candidates to appeal to a larger segment of the electorate. Candidates will therefore expand debate beyond the narrow scope of partisan concerns. R.T. 858-859. Petitioners at trial did not disagree. California's experience under its first blanket primary confirms this, as evidenced by the fact that Dan Lungren, the virtually unchallenged Republican candidate for Governor, participated in unprecedented debates with the three principal contenders for the Democratic nomination. Instead, petitioners cited expanded debate as one of the *harms* of the blanket primary. R.T. 721 (Sen. Art Torres: For example, blanket primary would require Democrats to "reopen" discussion of abortion).

6. The Blanket Primary Protects Voter Privacy.

Finally, the blanket primary serves a compelling state interest in protecting voter privacy. *Heavey v. Chapman*, 93 Wash.2d 700, 705, 611 P.2d 1256, 1259 (Wash. 1980). Most closed and open primaries force voters to publicize their party affiliation, exposing voters to hostility. *Tashjian*, 479 U.S. at 215 n.5. Petitioners admit that public affirmation of party affiliation exposes one's voting habits to public scrutiny. R.T. 142. Under a blanket primary, by contrast, voters are not required to make any declaration or public statement of affiliation. They may choose to keep their political affiliation secret.

7. The Blanket Primary Promotes Fairness.

Here, the District Court found: "It is apparent that the voters of California believe that the [electoral] system is fairer when all voters, including independents and regardless of party affiliation, may participate in framing the choice of candidates at the general election." Opinion, Pet. App. at 43a. The court held the voters' belief in the fairness of the electoral process is itself a "substantial state interest." *Id.*

C. The Blanket Primary Is Narrowly Tailored to Advance the State's Compelling Interests.

Given that the blanket primary imposes only slight burdens on the parties' associational interests, the fit between it and the State's goals can be less than perfect. But, as the District Court found, here the fit is actually perfect: "[T]he fundamental goal of enhancing representativeness by providing all voters with a choice that is not

predetermined by party members alone can *only* be advanced by the blanket primary." Pet. App. 43a. (Emphasis added). A blanket primary better serves the state's goals than a typical open primary or same-day registration in a closed or semi-closed primary. In those alternatives, voters must still forfeit their desired political affiliation or forgo effective participation in the democratic process. *See Burdick*, 504 U.S. at 444. (Kennedy, J., dissenting) (such options place a "substantial burden" on voter choice); *see also Bullock v. Carter*, 405 U.S. 134, 146 (1971) (unreasonable to require candidates and voters to abandon their party affiliation in order to effectively participate in the electoral process.) In addition, neither alternative would increase the competitiveness and representativeness of elections as would the blanket primary.

Examining this precise issue, the Washington Supreme Court concluded that the blanket primary was the only way to fully accomplish the State's objectives:

> [T]he state interest in allowing voters to support the candidates of their choice in a primary can be achieved *only* by the blanket primary which allows complete voter freedom in alternating votes between parties, since an open primary, on the other hand, restricts a voter to candidates of only one party. The blanket primary is *the least drastic means available* to promote this legitimate state interest.

Heavey, 611 P.2d at 1259 (emphasis added).

In sum, the interests of the state, indeed, of the voters of California, are powerful and uncontroverted, reflecting fundamental principles of representative democracy. They were given life directly – by a vote of the people. Proposition 198 reflects the "considered judgment" of the

citizens of California. *See Gregory*, 501 U.S. at 471. The record shows they have long preferred a more open system. *See* Mervyn Field, J.A. at 198-199. Absent a "clear constitutional limitation," California is free to structure its political system to meet its "special concerns and political circumstances." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8, 12 (1982).

This Court should accord substantial deference to the *manner* in which voters have chosen to structure their electoral system. The judiciary should not second guess the people's own determination as to the *need* for action to preserve public confidence in the electoral process. *Federal Elections Commission v. National Right to Work Committee*, 459 U.S. 197, 210 (1982); *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548, 567 (1973); *see also Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. at 907. This deference recognizes that the people of California are best equipped to balance "the myriad factors and traditions" in structuring the State's electoral system. *See Abrams v. Johnson*, 521 U.S. 74, 101 (1996); *Kusper v. Pontikes*, 414 U.S. 51, 63 (1973) (Blackman, J., dissenting) (States must have "elbow room" to formulate solutions for the many and particular problems confronting them in preserving the integrity of the franchise). Political theory as to the benefits of one system or another is not appropriate for judicial resolution. *Timmons*, 117 S.Ct. at 1371; *Tashjian*, 479 U.S. at 222.

Further, California's initiative is not "a right granted to the people, but a power reserved by them." *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal.3d 582, 591 (1976). It is "one of the most precious rights of our democratic process", *Rossi v. Brown*, 9 Cal.4th 688, 695 (1995), and California courts apply "a

liberal construction" to this power whenever it is challenged in order that the right not be improperly annulled. *Associated Home Builders of the Greater Eastbay*, 18 Cal.3d at 591. In a democracy, where the people are the best judges of who ought to represent them, the blanket primary powerfully reflects democratic ideals and virtue. A blanket primary is the most undiminished answer to Hamilton's call to popular election.

CONCLUSION

For the forgoing reasons, Respondents urge this Court to affirm the judgment of the Court of Appeals.

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In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE AND FREEDOM PARTY, *et al.*,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA and CALIFORNIANS FOR AN OPEN PRIMARY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The briefs of the parties clearly frame the issue before this Court. The political party petitioners assert that the First Amendment protects their right to choose nominees who best represent each party's ideology and preferences, and that that right is obliterated by Proposition 198, which allows all voters, "regardless of political affiliation[,]" to cross party lines and to vote in several parties' primaries at the same election. *See* Cal. Elec. Code § 2151.[1]

On the other hand, the State sees the partisan primary as an election, not a nominating event, and thus claims wide latitude to regulate it. In the State's view, the blanket primary is a sort of mini general election designed to avoid "discrimat[ion] based on party affiliation[.]" Resp.Br. 11. The State sees few if any associational rights involved. Rather the partisan primary, like the election process as a whole, begins to look something like a laboratory experiment that can be fine tuned to produce officials who "stand closer to the median policy positions of their districts[.]" Resp.Br. 40.

What the State overlooks is that the winner of each party primary becomes "the *nominee* of that party at the ensuing general election." § 15451 (emphasis added). The State has no right to commandeer parties during the primary election and attempt to steer them toward median policy positions. The First Amendment protects the right of a political party to choose its own standard

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[1] Unless otherwise noted, all statutory citations are to the California Elections Code.

bearer, not somebody else's standard bearer. *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 224 (1989); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). The First Amendment guarantees a party's right to choose a liberal standard bearer or a conservative standard bearer or any other kind of standard bearer it chooses. This is an area where "a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-124 (1981).

It is for this reason that Proposition 198 is unconstitutional. There is no doubt that Proposition 198 will flood California partisan primaries with voters who have no affiliation whatsoever with the party in whose primary they are voting. The presence of these voters will inevitably affect primary election results, the nature of the debate within the parties, and ultimately the parties' ideologies. This is the very objective of Proposition 198. This the State cannot do.

I. *TASHJIAN* CONTROLS THE RESULT HERE.

Respondents read *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) as recognizing the right of a political party to prevent "having the party's electoral base restricted contrary to the party's wishes." Resp.Br. 21. From this perspective, the right of political association becomes a one-way ratchet that protects a party's right to invite non-members to join in the nomination process, but does not protect a party's right to limit the nomination process to its own members.

Respondents misread *Tashjian*. The specific result in *Tashjian* was that a closed primary statute was held invalid as applied to a political party that sought to open its primary election to independents. But that result was based on a principle, the principle that "the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' " *Id.* at 214 (quoting *La Follette, supra*, 450 U.S. at 122). *Tashjian* made clear that this principle applies full bore when a party performs the "basic function" of choosing its nominees. *Id.* at 216. It is this principle that petitioners rely on in the present proceeding. Petitioners do not claim "unfettered control over who can vote in primary elections[.]" Resp.Br. at 19. Rather they assert that the associational right asserted here is stronger than that asserted in *Tashjian*, and the burden imposed by Proposition 198 is greater than the burden considered in *Tashjian*.

II. PROPOSITION 198 SEVERELY BURDENS PARTY ASSOCIATIONAL RIGHTS.

As petitioners set out in their opening brief, Proposition 198 severely burdens the associational rights of political parties by forcing them to accept "nominees" who are supported by neither a majority nor a plurality of party members. Pet.Br. at 27-33. Proposition 198 is designed to make crossover voting effortless and to give non-party members an equal role in choosing party nominees. This strikes at the very heart of the First Amendment, which protects the right of a political party to choose *its own* nominees. *Eu, supra*, 489 U.S. at 224; *Timmons, supra*, 520 U.S. at 359.

Respondents' Brief offers several arguments why Proposition 198 does not severely burden the parties, and therefore does not trigger strict scrutiny. None of these arguments has merit.

First, respondents contend that the harm inflicted by the blanket primary will be insubstantial because 90 to 95 percent of crossover voters are "sincere"[2] and because crossover voting "generally does not change the outcome of elections[.]" Resp.Br. at 27-31. Even if this were true (which petitioners dispute), it misses the point. The First Amendment protects the right of a political party to choose its own nominees. The motivation of outsiders who wish to join in the nominating process is irrelevant. Even "sincere" crossover voters have different preferences from party members and therefore will skew the results in an unknown number of nominating elections. Pl.Ex. 8 [Tables 1 and 3 of Addendum to Field Report].

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[2] While the issue is not relevant to the resolution of this case, the Court should be aware that there is considerable debate over what percentage of crossover voters are "sincere." It is true that one of the political parties' experts estimated that 90-95 percent of crossover voters vote for a "preferred" candidate. Pl.Ex. 7, p. 7 [Costantini Report]. However the State's expert on crossover voting estimated that among crossover voters in the 1988 Super Tuesday presidential primaries, about 30% were "true supporters" of the candidate they voted for, and the remaining 70% participated in some form of strategic voting. Def.Ex. H, pp. 24-27 [Nagler Report]. This wide variation is not an indication that anyone is dishonest or incompetent. Rather it is a result of the fact that none of the experts who testified at trial conducted original survey research; all were forced to interpret studies conducted by third parties, and those studies do not use consistent definitions of terms such as "true supporter," "preferred," and "sincere."

The very fact that Mervin Field, the leading poll taker in California, now surveys *all* voters to determine who will win party primaries, drives home this point. Pl.Ex. 8 [Addendum to Field Report]. Poll takers would not sample non-party members if it were not clear that the preferences of non-party members will significantly affect the results of primary elections. The State cannot claim that Proposition 198 will produce officials who "stand closer to the median policy positions of their districts than do those elected under closed primaries" and simultaneously deny that Proposition 198 will significantly affect the results of primary elections. Resp.Br. at 40.

Post-trial events further illustrate the effect of Proposition 198 on primary elections. As one example, California's March 7, 2000 Republican presidential primary pitted George Bush against John McCain. Separate tallies were kept of the results of that primary: one tally recorded the preference of Republican voters only, a second tally recorded the preference of non-Republicans voting in that primary. The results show that among Republican voters only, Mr. Bush beat Mr. McCain by more than 700,000 votes. Respondents' Second Lodging at 13. Among crossover voters, Mr. McCain beat Mr. Bush by a margin of 340,000 votes. Approximately 31% of the votes cast in the Republican primary were cast by non-Republicans. *Ibid*. While the difference in voting in that particular race was not outcome determinative, the enormous numbers of crossover votes in that race belies any argument that petitioners' concerns over the effects of crossover voting are "overdrawn." Resp.Br. at 27.

As a second example, recently-completed vote recounts in two Southern California races demonstrate

that crossover votes did, in fact, change the results of two Republican Assembly races in the 2000 primary.[3] *See Recounts Clinch GOP Suspicions*, Los Angeles Times, Orange County Edition, April 11, 2000, at B4; *Analysis proves point for open-primary foes*, Orange County Register, April 11, 2000, at B7. In both cases, one candidate was favored by the majority of voters in his party, but a large number of nonparty voters caused another candidate to be selected as the nominee of that party. Whether this was the result of "sincere" or "strategic" voting, the fact remains that the party members of those districts lost the ability to select their own nominee.

Second, the State argues that both open and closed primary systems allow some crossover voting, and that a decision invalidating Proposition 198 would inevitably lead to the invalidation of those systems as well. Resp.Br. at 31-33. Here the State paints with much too broad a brush.

No one would dispute that the American treatment of political parties is unique and that American political parties are among the most regulated in the world.[4] State

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[3] Petitioners' experts testified that crossover voting, particularly strategic crossover voting, was most likely to occur in low-profile Assembly races. R.T. 361 [Cain]; Pl.Ex. 7, p. 8 [Costantini].

[4] *See* L. Epstein, *Political Parties in the American Mold* (Wisconsin Press 1986), 156-157: "Generally . . . parties outside of the United States do not purchase the privilege of ballot access by surrendering control of their label bestowal to a government-conducted election or even to an election or other process closely supervised by governmental authority. Nor are these parties ordinarily subject to most of the other legal

laws requiring political parties to choose their nominees by direct primary election became common in the beginning of the Twentieth Century.[5] Once the States began conducting primary nomination elections, the States necessarily became involved in supervising the conduct of those elections. In particular, the States began to regulate who could vote in party primaries. But the original justification for that regulation was to ensure that the nominees of the parties were elected in a fair and impartial manner *by the members of the party*. *See Socialist Party v. Uhl*, 155 Cal. 776, 793, 103 P. 181 (1909) ("If the indiscriminate right to vote with any party at a primary were given to electors, whether they were in accord with the principles of the party or not, it would soon tend to destroy all party organization").

As the State notes, some level of crossover voting is possible in any primary election scheme. Even in a closed primary system, voters can cheat – they can register with a party with which they do not affiliate. 984 F.Supp. at 1298, fn. 25; Pet.App. 72a. And in an open primary system, where voters can choose the ballot of any party, voters can choose to vote the ballot of a party they do not

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regulations imposed on the internal affairs of American parties."

[5] In *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court held that "It is too plain for argument . . . that the State . . . may insist that intraparty competition be settled before the general election by primary election or by party convention." *Id.* at 781; *see also Lightfoot v. Eu*, 964 F.2d 865, 872-873 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) (upholding California statute that requires political parties to nominate by primary election).

favor. But the fact that any direct primary system will have some impact on party associational rights does not allow the State to structure a primary system that maximizes that impact. Proposition 198 is designed to make crossover voting painless and to invite the entire electorate to join in choosing party "nominees."[6] A constitution that holds that "[t]he *independent* expression of a political party's views is 'core' First Amendment activity" does not permit California to force upon a party a nominating procedure that robs it of that independence. *See Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 616 (1996) (emphasis added).

Third, the State argues that Proposition 198 does not burden the parties' traditional activities. Resp.Br. at 33-36. This argument is wholly based on the State's characterization of "traditional activities." The traditional activity that the political parties wish to engage in is the nomination of candidates who best represent each party's ideology and preferences, and it is that activity that is severely burdened by Proposition 198.

Fourth, the State argues that the parties can avoid the effect of Proposition 198 completely by using California's independent nomination procedure to place candidates directly on the general election ballot. Resp.Br. at 38. This is wholly unrealistic. An independent candidate must disaffiliate from all political parties at least 13 months

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[6] Proposition 198 dramatically reduces the cost of strategic voting. All other forms of primaries require voters to declare at some point which party primary they wish to participate in. In these other systems, a crossover voter forfeits the right to vote in his or her own party primary. J.A. 61 [Cain Report].

before the general election. § 8550(f); *see Storer v. Brown*, 415 U.S. 714, 735 (1974) (California disaffiliation statute "protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot"). Even if, e.g., the Libertarian Party had the foresight to have a number of candidates disaffiliate from the party 13 months before the general election, those candidates would appear on the general election ballot not as Libertarians but as independents, and would run against Libertarian "nominees" chosen through the blanket primary. This is not a viable solution; it is a recipe for political suicide.

III. PROPOSITION 198 PARTICULARLY BURDENS THE MINOR PARTIES, WHO DO NOT SEEK TO PURSUE "MEDIAN POLICY POSITIONS."

The District Court concluded that the major parties "have been characterized by a fluidity and overlap of philosophy and membership" and at different times have been "composed of various elements reflecting most of the American political spectrum." 986 F.Supp. at 1296; Pet.App. 65a-66a; quoting *La Follette, supra*, 450 U.S. at 133 (Powell, J., dissenting). Leaving aside the question whether this is an accurate characterization of the major parties, it is certainly not an accurate characterization of the minor parties. The Libertarian Party and the Peace and Freedom Party have distinct ideologies at opposite ends of the political spectrum. Compare J.A. 76-79 [Libertarian Party Statement of Principles] with J.A. 82-83 [Peace and Freedom Party 1996 Platform]. They have no desire to be moved back to the middle of the spectrum.

They are at the greatest risk that the "inclusion of persons unaffiliated" with them will "seriously distort" their collective decisions. *See La Follette, supra,* 450 U.S. at 122.

The State suggests that the minor parties use the primary ballot only for "expressive purposes." Resp.Br. 36. This is nonsense. The minor parties use the primary to choose the nominees who will best represent them at the ensuing general election. Their only expressive purpose is to make sure that the nominees – who will be described on the general election ballot by the labels "Libertarian" or "Peace and Freedom" – are really chosen by the Libertarian and Peace and Freedom parties.[7] The State also suggests that the impact of Proposition 198 on the minor parties is lessened because few minor party primaries are contested.[8] Resp.Br. 37. But the frequency with which an event occurs has no relationship to its importance or to the extent of the constitutional protection that attaches to it. It is reasonable to assume that minor party contested primaries occur when there are serious differences of opinion within the party. The selection of a nominee is the mechanism by which such disputes are resolved. This is precisely the situation in which the freedom of association is most important.

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[7] The party label is "one of the most important pieces of information that a voter can have about candidates and their likely actions in office." J.A. 57 [Cain Report].

[8] Petitioners' opening brief identified three 1998 primary races where the number of nonparty voters in contested minor party primaries exceeded total party registration. Pet.Br. 36-37.

IV. PROPOSITION 198 IS NOT NARROWLY TAILORED TO ADVANCE A COMPELLING STATE INTEREST.

The State now asserts that Proposition 198 advances seven compelling state interests, an increase of two over the number claimed in the Court of Appeals. We will briefly address the two new interests.

Affording voters more choice. On a purely quantitative level, a blanket primary increases the number of candidates a voter can choose from in a primary election. But in California the partisan primary is a nominating event. The State has no compelling interest in allowing nonparty members to choose party nominees. The State's power to regulate elections and set voter qualifications must be exercised without infringing upon "basic constitutional protections." *Kusper v. Pontikes,* 414 U.S. 51, 57 (1973).

Any primary election system narrows the range of available candidates. A partisan primary does this in a particular way – it allows an unlimited number of candidates to compete for party nominations, but each party may only advance one candidate to the general election. The electorate is then presented with a range of candidates who represent the ideological spectrum of the parties participating in the process. To the extent that Proposition 198 produces more centrist candidates, voters will be presented with fewer choices from a narrow ideological range. J.A. 70-71 [Cain Report].

Promoting "fairness." This is a predictive judgment that is not susceptible to proof. It can just as easily be argued that Proposition 198 promotes "unfairness"

because it produces "nominees" who are not supported by the party they "represent."

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

BILL JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)	19
Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989)	12
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Callaghan v. Alaska, 914 P.2d 1250 (Alaska 1996)	5
Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996)	20

Cited Authorities

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Davis v. Bandemer, 478 U.S. 109 (1986)	12
Democratic Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981)	21, 22
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McDaniel v. Paty, 435 U.S. 618 (1978)	2

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Molinari v. Powers, 2000 WL 154163 (E.D.N.Y. 2000)	10
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Other Authorities:

R. Michael Alvarez & Jonathan Nagler, *Should I Stay or Should I Go? Sincere and Strategic Crossover Voting in California Assembly Races, in California's Open/Blanket Primary: A Natural Experiment in Electoral Dynamics* (Bruce E. Cain & Elisabeth R. Gerber eds., forthcoming 2000) 15, 16

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Jonathan Cohen, Thad Kousser & John Sides, *Sincere Voting, Hedging, and Raiding: Testing a Formal Model of Crossover Voting in Blanket Primaries*, Presented at the Annual Meeting of the American Political Science Association, Atlanta, Ga., September 2-5, 1999 ..... 15, 16

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Christian Collet, *Openness Begets Opportunity: Minor Parties and the First Blanket Primary in California, in California's Open/Blanket Primary: A Natural Experiment in Electoral Dynamics* (Bruce E. Cain & Elisabeth R. Gerber eds., forthcoming 2000)	27
Maurice Duverger, *Political Parties* (Barbara & Robert North trans., 1964)	3, 9
Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J. L. Econ. & Org. 304 (1998)	3, 5
Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (1969)	3
Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* (1998)	2
Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries, in Nomination Politics and Congressional Representation* (Peter Galderisi & Mike Lyons eds., forthcoming 2000)	3

Cited Authorities

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V.O. Key, *Politics, Parties & Pressure Groups* 163-65 (5th ed. 1964) 11

Thad Kousser, *Crossing Over When It Counts: How the Motives of Voters in Blanket Primaries Are Revealed by Their Actions in General Elections, in California's Open/Blanket Primary: A Natural Experiment in Electoral Dynamics* (Bruce E. Cain & Elisabeth R. Gerber eds., forthcoming 2000) 16

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Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, *Third Parties in America* (1984) 23, 24

E.E. Schattschneider, *Party Government* (1942) .. 3

John M. Sides, Jonathan Cohen & Jack Citrin, *The Causes and Consequences of Crossover Voting in the 1998 California Elections, in California's Open/Blanket Primary: A Natural Experiment in Electoral Dynamics* (Bruce E. Cain & Elisabeth R. Gerber eds., forthcoming 2000) 16

Cited Authorities

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Wendy K. Tam Cho & Brian J. Gaines, *Candidates, Donors, and Voters in California's First Blanket Primary Elections, in California's Open/Blanket Primary: A Natural Experiment in Electoral Dynamics* (Bruce E. Cain & Elisabeth R. Gerber eds., forthcoming 2000) 15

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INTEREST OF THE *AMICUS CURIAE*

The Brennan Center for Justice at New York University School of Law is a partnership between the family, friends and former law clerks of Justice William J. Brennan, Jr., and the faculty of New York University School of Law, designed to honor Justice Brennan's extraordinary contribution to American law.[1] The Brennan Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist courts and legislatures in developing practical solutions to difficult problems in areas that were of special concern to Justice Brennan. Before giving his approval to the enterprise, Justice Brennan obtained a promise that the Brennan Center would function as a nonpartisan, independent center of thought, paying no special deference to his views or to the opinions that he authored. In keeping with Justice Brennan's spirit, the Center has established a Democracy Program, which undertakes projects to promote equal representation and broad-based electoral participation.

The Brennan Center believes that states should be free to experiment with a variety of candidate selection methods, including a blanket primary, in order to encourage voter participation in elections. *Amicus* submits this brief on behalf of neither party, however, in an attempt to bring to the Court's attention empirical data and constitutional analysis that support an approach sensitive to the political and legal differences between major and minor parties.

Amicus submits this brief with the written consent of the parties. The consents have been filed with the Clerk of the Court.

---

1. Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *Amicus*, contributed monetarily to the preparation and submission of this brief.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

Article IV, section 4 of the Constitution guarantees "to every state in this Union a Republican form of government." The Constitution does not, however, impose a single conception of what it means to have "a Republican form of government." *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). The text of the original Constitution is virtually silent concerning the rules governing elections at the state and local level.[2] Although six Amendments,[3] and numerous decisions of this Court mapping the modern contours of the right to vote, the right to run for office, and the right to fair representation,[4] provide fixed guidance in certain areas, the states of the federal union remain free to experiment broadly within the expansive domain of democratic political theory. States may experiment with, *inter alia*, unicameral legislatures, direct democracy, nonpartisan registration and elections, multimember districts, term limits for state and local officials, proportional representation, parliamentary government, a plural executive, and advisory opinions on the constitutionality of proposed legislation. This

2. The principal textual limitations on state power over elections in the body of the Constitution are the qualification clauses governing the election of members of Congress, and the ban on religious tests for office. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

3. The 15th Amendment guarantees the right to vote to racial minorities. The 17th Amendment requires popular election of Senators. The 19th Amendment guarantees the right to vote to women. The 23rd Amendment permits residents of the District of Columbia to vote for President. The 24th Amendment bars the poll tax in federal elections. The 26th Amendment grants the vote to persons over 18. This Court has also construed the 1st and 14th Amendments as protecting basic rights to participate in the democratic process.

4. The principal cases are set forth in Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* (1998).

case poses the important question of whether states may similarly experiment with different models of selecting candidates for the general election.

American democracy has adopted multiple techniques to select candidates for the general election. In the earliest days of the Republic before the formation of political parties, candidates were often chosen informally by a consensus of locally prominent persons.[5] With the emergence of political parties, candidates were nominated through a variety of nomination processes, including caucuses, party conventions, and a variety of primary election systems. Today, although about a third of the states use caucuses for one or both parties' nomination of presidential candidates, all states require or make available primary elections for nomination of candidates for elections to the U.S. Congress and state legislatures.[6] These systems vary

5. As initially conceived, the Constitution was designed to govern without political parties. *See, e.g.*, Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840*, at 40 (1969); Gordon Wood, *The Creation of the American Republic* 506-09 (1969). The consensus of modern political science is that political parties are indispensable elements in a functioning democracy, acting as "intermediate" institutions permitting individuals to aggregate preferences in an effective manner. *See, e.g.*, Maurice Duverger, *Political Parties* (Barbara & Robert North trans., 1964); E.E. Schattschneider, *Party Government* (1942); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 Colum. L. Rev. (forthcoming Apr. 2000).

6. Some states, such as Virginia, allow for conventions to replace primaries, and others, such as Connecticut, require that candidates first receive a certain percentage of the vote in a convention to be on the primary ballot. Data presented here on primary systems refer to the electoral scheme used for nominating candidates for general elections to the U.S. House of Representatives and is garnered from Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J. L. Econ. & Org. 304 (1998), and Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries, in Nomination Politics and Congressional Representation* (Peter Galderisi & Mike Lyons eds., forthcoming 2000). The information is current as of 1996, except for California, which is current as of 2000.

considerably in their degree of "openness" — that is, how free every voter is to cast a ballot in the primary election for his or her candidate of choice for each elected office.

Although each state employs a distinctive set of primary rules and different parties in the same state will sometimes opt for a different set of rules for nominating candidates, state primary systems fall into several categories.

- *Closed primary*: Only registered party members can vote in a closed party primary. Closed primaries vary depending on how far in advance of an election a voter must affiliate with a party to earn the right to participate in that party's primary. At one extreme stands New York, which limits its primary to voters registered as members of the political party eleven months prior to the primary election. Under such a system, voters must declare their party affiliation often long before knowing the identities of the candidates or the scope of the issues.[7] At the other extreme is Delaware, which allows voters to register with parties 10 days in advance of the primary. Closed primary states include: Arizona, Connecticut, Delaware, Florida, Kentucky, Maryland, Nevada, New Mexico, New York, Pennsylvania, and South Dakota.
- *Independent voter option primary*: While the closed primary states limit primary voting to party members, several states seek to ensure that both newly registered and independent voters may participate in their primary of choice. Colorado, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, Oklahoma, and Rhode Island grant to previously unaffiliated voters the right to choose on election day the party primary in which they wish to participate. Formally affiliated party members in these states remain limited in their choice of primary.

7. The constitutionality of New York's extremely restrictive 11 month waiting period for party affiliation was narrowly upheld in *Rosario v. Rockefeller*, 410 U.S. 752 (1973). Illinois' 23 month waiting period was invalidated in *Kusper v. Pontikes*, 414 U.S. 51 (1973).

- *Open primary*: Almost half the states use some version of the open primary,[8] in which every voter is allowed to choose on election day the primary in which they wish to vote. These states vary in whether they merely allow voters to affiliate with a party on election day, whether they give all voters every primary ballot as they enter the voting booth, or whether they ask voters before entering to choose the party primary in which they wish to vote on that day. But the bottom line is the same: any voter can vote in any primary regardless of their partisan registration status prior to the election.
- *Blanket primary*: Used in Alaska, California, and Washington, the blanket primary differs from the open primary only in that it allows voters to switch primaries for each office. A Democratic voter, for example, can vote in the Republican primary for Governor, the Libertarian primary for U.S. Representative, and the Democratic primary for State Assembly. Under the blanket primary, therefore, voters are not constrained by their partisan affiliation on the day of the election, nor are they forced to "commit" to a party by requesting only one party's primary ballot. The lower courts have uniformly upheld the constitutionality of blanket primaries. *See Callaghan v. Alaska*, 914 P.2d 1250 (Alaska 1996); *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980).

8. *See* Gerber & Morton, *supra* note 6, at 306 (listing Alabama, Arkansas, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, Wyoming as using some version of the open primary as of 1990). Louisiana employs a nonpartisan primary election, which lists all primary candidates on the same ballot. The two highest vote-getters in a Louisiana primary, regardless of party affiliation, then advance to the general election. *See Foster v. Love*, 118 S. Ct. 464, 469 (1997) (holding that Louisiana's primary must comport with federal law requiring decisive election for federal offices to occur on specified day).

As the heated exchanges between the ballot pamphlets accompanying the initiative vote[9] and the disagreement between the political scientists who testified in the district court demonstrate, controversy exists over the relative merits of the various candidate selection techniques. There is, of course, no definitive answer to the question of which nominating technique best serves democracy: each approach has its own costs and benefits. The range of nomination techniques currently in use is, however, mute testimony to the fact that reasonable people deeply committed to democracy can disagree over which of the competing models best serves democratic values. The issue posed by this case is whether the Constitution takes that choice out of the hands of the people.

Petitioners argue that the undoubted First Amendment right of a political party to a degree of autonomy from government regulation forbids a state from requiring a political party to permit participation by independents and members of other political parties in its nominating process pursuant to a blanket primary, even when the majority of the state's voters believe that democracy would be enhanced by a system that opens the nominating process to the entire electorate without onerous transaction costs. *See California Democratic Party v. Jones*, 169 F.3d 646, 653-54 (9th Cir. 1999). Taken to its logical end, petitioners' assertion of a robust right of party autonomy that trumps the people's efforts to democratize the nominating process might call into question the decision of every state that requires some form of party primary as an integral part of the electoral process. If, as petitioners argue, party autonomy shields a political party's nondiscriminatory nominating processes from state regulation, it is unclear why states may require primaries at all when the "autonomous" party wishes to nominate by leadership selection, caucus, or convention. *See*

9. Proposition 198, opening the primary process to the entire electorate, was adopted by 59% of the electorate, including clear majorities of the members of both major parties. *See California Democratic Party v. Jones*, 169 F.3d 646, 649 (9th Cir. 1999).

California Democratic Party, 169 F.3d at 654 (citing *Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir. 1992) (upholding state mandated primary election)).

Whatever the impact of petitioners' party autonomy argument on obligatory primaries generally, petitioners' view of a robust First Amendment right of party autonomy, which insulates party nominating processes from "outsiders," challenges the ability of states to provide for anything other than a closed primary. *See California Democratic Party*, 169 F.3d at 654-55. In all the other variants of primaries currently in use, including the closed primary, voters may move with varying degrees of ease from one party primary to another after the identities of the candidates are known. In a closed primary, the move, typically, must be made at least one month before the primary. In an open or blanket primary, the move need not be formalized, and may be carried out on election day. If petitioners are correct in arguing that the Constitution prevents the state from allowing "outsiders" to participate in an unreceptive political party's nominating process, their argument would call into question not only the blanket primary, but the open primary and the independent voter option primary, as well. *Id.*

Petitioners argue that blanket primaries are constitutionally distinguishable from open primaries and from other forms of outsider access primaries because the absence of transaction costs in blanket primaries increases the likelihood that large numbers of outsiders will crash the party's primary. *Id.* at 655-56. An empirically debatable assumption about the relative number of likely crossover voters in an open primary, as opposed to a blanket primary, is, however, a thin reed on which to base a First Amendment distinction. If blanket primaries violate the Constitution, it is difficult to imagine the continued constitutional viability of the open primaries that govern elections in nearly half the states.

Amicus believes that states should be permitted to broaden citizen participation in the election of governing officials by

eliminating the transaction costs associated with participation in the nominating processes of major parties. While a major political party's First Amendment interest in autonomy from government regulation is a real one, it is balanced by the state's countervailing First Amendment interest in involving the entire electorate in the process of selecting those who will serve as government officials. Where, as here, important but conflicting First Amendment interests in democratic governance are in rough equipoise, the Constitution does not compel the adoption of a particular conception of democracy. Ultimately, only the people can choose between the benefits of major party autonomy and the benefits of enhanced participation in the process by which governing officials are chosen.

Where, however, a state seeks to force a minor political party, which has virtually none of the benefits and governmental responsibilities of the major parties, to open its primary elections to outsiders, the weighty First Amendment state interest in involving the entire electorate in the choice of future government officials is not present. The lack of a compelling interest in opening the nomination process of minor parties to outsiders, coupled with the enhanced interest in autonomy enjoyed by ideologically defined minor parties, renders the involuntary application of open or blanket primaries to such parties unconstitutional.

ARGUMENT

I.

MAJOR POLITICAL PARTIES MAY BE REQUIRED TO PERMIT NONMEMBERS TO PARTICIPATE IN THEIR PRIMARY ELECTIONS, WHICH ARE AN INTEGRAL PART OF THE DEMOCRATIC PROCESS BY WHICH GOVERNING OFFICIALS ARE CHOSEN.

A. The State Has a Compelling Interest in Requiring Major Parties to Hold Primary Elections Open to the Entire Electorate.

Major parties in the American political system owe their dominant status to the regulatory structure in which they operate. A representational system based on single-member districts combined with an electoral system where the "winner takes all" inevitably generates two dominant parties with weak ideological underpinnings. *See* Maurice Duverger, *Political Parties* 206-28 (Barbara & Robert North trans., 1964). In the context of such a system, the process by which the major parties choose their respective candidates is, therefore, an integral exercise of the power to govern because that process will organize a choice between only two candidates who have a realistic chance of winning the general election. It is a highly selective conception of autonomy that embraces regulatory judgments that reinforce major party dominance, but rejects regulations designed to increase participation in the exercise of that dominance. Moreover, in a single-member-district system like ours, where one party is often dominant in a particular jurisdiction because of partisan gerrymandering and other incumbency advantages, the selection of a nominee by the dominant party is often the only point in the electoral process where there is an opportunity to cast a meaningful vote.

In the *White Primary Cases*, this Court recognized that, under our system, the primary elections of major parties, including the informal pre-primary elections leading up to the

primary, are integral parts of the election process by which those who are to govern are selected by the people. *See United States v. Classic*, 313 U.S. 299, 318 (1941) (Major party nominating processes can be "an integral part of the procedure of choice" in selecting governing officials.); *Smith v. Allwright*, 321 U.S. 649, 659-60 (1944); *Terry v. Adams*, 345 U.S. 461, 469 (1953) (the *White Primary Cases*). Accordingly, even in the absence of traditional state action, this Court recognized that primary and pre-primary elections by major parties are integral aspects of the election process and must, therefore, be subject to the self-executing provisions of Section 1 of the Fourteenth Amendment.[10]

In the years after the *White Primary Cases*, a spirited debate has arisen concerning the most desirable way to structure the primary elections of major political parties that function as integral aspects of the electoral process. Major party leaders, supported by thoughtful political scientists, have often argued that our system of democracy will be enhanced by limiting participation in the primary elections of major parties to persons who espouse the party's general philosophy. (Indeed, the current Republican presidential nomination contest has presented the question squarely for a national audience. *See* Keith Bradsher, *Loss by Bush Forces Debate on Open Primaries*, N.Y. Times, Feb. 27, 2000, at A33.) Autonomous, self-governing parties, it is argued, are essential to the vigorous operation of a winner-take-all, single-member-district system of democracy. Limiting participation to party loyalists, it is further argued, leads to the selection of candidates that provide the electorate with a clear

10. In the years after the *White Primary Cases*, state legislation governing the right to participate in primary elections has been subjected to constitutional scrutiny that appears indistinguishable from the scrutiny applied to general elections. *See, e.g., Bullock v. Carter*, 405 U.S. 134, 140 (1972) (invalidating substantial filing fees for running in primary election); *Gray v. Sanders*, 372 U.S. 368, 374 (1963); *Molinari v. Powers*, 2000 WL 154163 (E.D.N.Y. 2000) (invalidating unduly burdensome rules governing access to primary ballot); *Rockefeller v. Powers*, 917 F. Supp. 155, 160 (E.D.N.Y.) (same), *aff'd*, 78 F.3d 44 (2d Cir.), *cert. denied*, 517 U.S. 1203 (1996).

choice on the issues, preserves the major parties from sabotage or strategic voting, and strengthens the ability of party activists to function at the grassroots level.

Not surprisingly, because they often control both the party organization and the "party in the government,"[11] major party leaders have been successful in persuading many state legislatures to adopt precisely such a closed conception of a major party primary. State imposed party loyalty oaths for candidates, as opposed to primary voters, have been upheld by this Court, as have "sore loser" statutes (barring a participant in a party primary from running as an independent in the general election), and bans on cross-endorsements (barring more than one party from nominating a particular candidate). *See Ray v. Blair*, 343 U.S. 214, 231 (1952) (upholding party loyalty oaths for candidates for presidential electors); *Storer v. Brown*, 415 U.S. 724, 733 (1974) (upholding "sore loser" ban on independent candidacy if participated in party primary, or was registered member of party within past year); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (upholding ban on cross-endorsements). The Court has also upheld significant state-imposed limits on the ability of nonmembers to vote in a party primary. *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (upholding state law requiring that voter affiliate with major party eight months before presidential primary, and eleven months before nonpresidential primary); *Nader v. Schaffer*, 417 F. Supp. 837, 849 (D. Conn.) (upholding state law barring independents from voting in party primary), *summarily aff'd*, 429 U.S. 989 (1976). *But see Kusper v. Pontikes*, 414 U.S. 51, 61 (1973) (invalidating state law requiring that voter affiliate with party twenty-three months before primary); *Tashjian v. Republican Party*, 479 U.S. 208, 225 (1986)

11. *See generally* V.O. Key, *Politics, Parties & Pressure Groups* 163-65 (5th ed. 1964) (describing parties as consisting of three components: a party in the electorate, a party in the government, and professional party workers).

(invalidating state law forbidding political party from allowing nonmembers to vote in party primary).

But party leaders have not always succeeded or desired to succeed in persuading states to adopt a closed conception of a party primary election. Moved by a desire to open the processes by which governing officials are actually chosen in our democracy, many states have opted for a more open conception of the primary process that permits, even encourages, all eligible voters, regardless of party affiliation, to participate in a major party primary of choice. A state might choose an open conception of the primary process for several reasons. First, in a system of winner-take-all, single-member districts, the act of drawing district lines will often create a de facto one-party monopoly, essentially disenfranchising adherents of the hopelessly outnumbered party. *See Davis v. Bandemer*, 478 U.S. 109, 125 (1986) (recognizing cause of action for gross partisan gerrymandering). Instead of relying on the demonstrably inadequate cause of action recognized in *Davis v. Bandemer*,[12] voters and representatives, through either popular initiative or legislation, could choose to expand the franchise to the nominating stage in an effort to permit the entire electorate to participate in the selection of the almost certain winner.

Second, in an era of dramatically declining voter participation, states may seek to open the nominating process to all in an effort to stimulate participation in the electoral process by encouraging voters to participate in any election that draws their interest. Such a state interest is particularly important in areas where reciprocal partisan gerrymandering has left many

12. It has proven virtually impossible to satisfy the demanding standards imposed in *Davis v. Bandemer*. *See Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989). The only reported case to have made out a partisan gerrymandering claim is *Republican Party v. Martin*, 980 F. 2d 943, 961 (4th Cir. 1992), and that case appears to have been wrong. *Republican Party v. Hunt*, 77 F.3d 470 (4th Cir. 1996) (unpublished opinion) (vacating and remanding in light of 1994 elections).

voters with little or no incentive to vote in the general election because the outcome is a foregone conclusion. Even in elections untouched by partisan gerrymandering, states may have adopted open or blanket primaries in the hope of stimulating voter interest in elections with shockingly low, declining patterns of voter turnout.

Finally, states may adopt open primaries in recognition of the fact that extremely low patterns of voter participation in closed party primaries tend to overvalue the power of party leaders and extreme partisans. In an effort to prevent both major party primaries from selecting candidates that are unappealing to the broad electorate, states might experiment with opening the primary to precisely that general electorate.

B. The Major Parties' Interest in Preventing Nonmembers from Participating in Their Nominating Processes Does Not Outweigh the State's Interest in Promoting Participation in Critical Stages of the Election of Government Officials.

Choosing either an open or closed conception of a primary election carries costs. Closed primaries freeze interested voters out of participating in crucial aspects of the process of selecting government officials, risk overvaluing the power of strong partisans, and reinforce a sense of alienation that depresses voter turnout. Despite the obvious costs, however, since reasonable persons can believe that closed primaries are essential means of assuring strong political parties, this Court has rejected efforts to use the Constitution to force the adoption of an open conception of the primary process. Indeed, the Court has overturned state efforts to require closed primaries only when the affiliation period was unreasonably long, or where the political parties themselves did not wish such "protection." *See Kusper*, 414 U.S. at 61; *Tashjian*, 479 U.S. at 225.

Selecting an open primary also carries costs. It weakens the ideological coherence of a major party by permitting persons who do not share the party's philosophy to exercise a role in

selecting its nominees. While such a cost is significantly lessened by the fact that the party may insist that any candidate be a party member, there is no doubt that open primaries risk blurring the already hazy ideological lines between the major parties. Open primaries also carry the risk that nonmembers will maliciously invade an opposing party's primary in order to select a weak nominee. Other voters may cross over to another party in an open primary, not because they wish to harm the party, but because they wish to hedge their electoral bets by selecting a second-best candidate in case their first choice loses in the general election. Such "strategic" voting is particularly likely in one-party settings where the primary election is the only chance to influence the identity of the winner of the general election.

In short, the central issue in deciding whether to adopt a blanket or an open primary, on the one hand, or whether to operate a closed primary, on the other hand, is whether the real benefits that flow from increasing the ability to participate in the actual selection of governing officials are outweighed by the real costs to party autonomy. The First Amendment simply does not answer that question.

C. Neither Empirical Data nor Constitutional Analysis Preclude a State from Determining That the Benefit to Democracy from a Major Party Blanket Primary Outweighs the Cost.

1. Empirical Data Do Not Support a Ban on Blanket Primaries for Major Parties.

Although California has operated only one blanket primary thus far, the data analysis that followed in its wake aids in assessing the nature and extent of the asserted injury to

California's dominant political parties.[13] How to interpret these findings remains a point of vigorous argument, and the findings vary somewhat depending on the particular race discussed. The data do not, however, resolve the policy question (much less, the constitutional issue) of whether the blanket primary is so destructive to major party autonomy so as to require judges to intervene.

- Voter turnout increased 2.4% over the previous midterm election largely because the blanket primary initiative enfranchised California's 1.8 million independent voters.[14]
- Although 15% to 20% of voters, on average, crossed over to vote in a primary of the party of which they were not a member, there is no evidence that any group in any race organized to "raid" the opposing party's elections (*i.e.*, to try deliberately to help nominate the weaker candidate of the opposition party).[15]

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13. The data analysis presented here comes chiefly from *California's Open/Blanket Primary: A Natural Experiment in Electoral Dynamics* (Bruce E. Cain & Elisabeth R. Gerber eds., forthcoming 2000) and is available from the Institute of Governmental Studies at the University of California at Berkeley. Similar conclusions, which also use data from Washington State, appear in Jonathan Cohen, Thad Kousser & John Sides, *Sincere Voting, Hedging, and Raiding: Testing a Formal Model of Crossover Voting in Blanket Primaries*, Presented at the Annual Meeting of the American Political Science Association, Atlanta, Ga., September 2-5, 1999 (available at <http://pro.harvard.edu/abstracts/036/036006SidesJohn0.html>).

14. *See* Wendy K. Tam Cho & Brian J. Gaines, *Candidates, Donors, and Voters in California's First Blanket Primary Elections*, *in* Cain & Gerber, *supra* note 13, at ch. 9 (draft available at <http://cho.pol.uiuc.edu/~wendy/>).

15. *See* R. Michael Alvarez & Jonathan Nagler, *Should I Stay or Should I Go? Sincere and Strategic Crossover Voting in California Assembly Races*, *in* Cain & Gerber, *supra* note 13, at ch. 6.

- Most voters who crossed over into the opposing party for the primary appear to have continued to support that party's nominee in the general election. In the gubernatorial race, for example, approximately 63% of Republican voters who crossed over into the Democratic primary ended up voting for the Democratic nominee, Gray Davis. Moreover, approximately 75% of Republicans who crossed over and voted specifically for Davis in the primary also voted for him in the general election. A similar trend was observed in the race for U.S. Senate, but scholars disagree on the extent of loyal crossover voting in elections to the state legislature.[16]
- Voters were more likely to cross over into another party's primary if that primary was more competitive than their own, if the incumbent running for reelection was from the other party, and if the partisan balance in a district was highly skewed in favor of the other party.[17]

The evidence from this single election, while hardly determinative of the issue of the desirability of the blanket primary, suggests at least that the constitutionally permissible vision of democracy that motivated voters' to pass the Open Primary Initiative has borne its intended fruits. Voters did

16. *See* John M. Sides, Jonathan Cohen & Jack Citrin, *The Causes and Consequences of Crossover Voting in the 1998 California Elections*, *in* Cain & Gerber, *supra* note 13, at ch. 5 (analyzing gubernatorial and senate races); R. Michael Alvarez & Jonathan Nagler, *supra* note 15 (finding little strategic crossover voting in state assembly races); Thad Kousser, *Crossing Over When It Counts: How the Motives of Voters in Blanket Primaries Are Revealed by Their Actions in General Elections*, *in* Cain & Gerber, *supra* note 13, at ch. 8 (also available at <http:\\socrates.berkeley.edu\~tkousser>) (finding extensive crossover voting in some state legislative primaries that did not replicate itself in the general election).

17. *See* Cohen, *et al.*, *supra* note 13, at 28; Kousser, *supra* note 16.

not raid the opposing primary in order to force the nomination of a weak candidate. As a general rule, those voters who crossed over did so in order to help narrow the choices down to their two most-preferred candidates. As intended, the primary election became the first stage in an integrated process of democratic selection through which all voters could have the most say in who would eventually win elected office. The blanket primary enfranchised independent voters, increased participation in the primary as a whole, and gave voters an additional opportunity to express themselves when they felt their vote could make a difference.

2. Constitutional Analysis Does Not Support a Ban on Open Primaries.

Petitioners argue that the choice between an open and a closed primary is mandated by the First Amendment; the people have no latitude to assess for themselves the relative empirical costs and benefits to democracy of the two competing methods of organizing the nominating processes of the major parties. *California Democratic Party*, 169 F.3d at 653-54. Citing *Tashjian* and *Eu v. S.F. County Democratic Cent. Committee*, 489 U.S. 214 (1989), petitioners argue that this Court has recognized a constitutional right to party autonomy rooted in the First Amendment's protection of political association. Since open primaries clearly diminish a party's autonomy, therefore, they must be unconstitutional.

Petitioners' constitutional syllogism is, however, deeply flawed. Petitioners' argument focuses exclusively on the tension that exists between democracy and the First Amendment. First Amendment rights to speech, press, and association, they maintain, are designed exclusively to place limits on the majority's power to limit autonomous behavior by individuals or groups, regardless of whether the challenged regulation is designed to enhance participation in the democratic process. In short, according to petitioners, when government impinges on the autonomous behavior of some, government always wears

the black hat, even when it is seeking to enhance the ability of others to participate more fully in the democratic process. But such a myopic vision of the First Amendment that views it as unremittingly hostile to democracy fails to grasp the complex, symbiotic relationship between the two bedrock principles of our constitutional order.

Read as the Framers understood it, the First Amendment is neither exogenous to, nor hostile to, democracy. Vigorous judicial protection of speech, press, and association reinforces democracy by preserving the freedom to engage in forms of autonomous behavior that are essential to democracy's success. However, just as the First Amendment *disables* government from interfering with autonomous behavior that is crucial to democracy, it also *empowers* government to act to preserve and expand full participation in the democratic process, even when such an expansion results in a modest decrease in autonomy for some. Thus, in *Burson v. Freeman*, 504 U.S. 191 (1992), this Court upheld a ban on electioneering at the polls because the limitation on autonomous behavior was more than offset by the increase in the ability of voters to participate more thoughtfully in the democratic process. *Id.* at 211. Where, as here, government acts, not to limit democratic participation, but to expand the ability of individuals to participate in the democratic process, government does not act as a foe of the First Amendment, but as its implementing arm. *See South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (upholding Section 5 of the Voting Rights Act); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (upholding congressional abolition of English language literacy tests for voting); *Morse v. Republican Party*, 517 U.S. 186, 210 (1996) (upholding application of section 5 of the Voting Rights Act to changes in party nomination rules). Accordingly, when government acts to expand or to protect participation in the democratic process, First Amendment values are present on both sides of the constitutional equation. In such a setting, unless the democracy-enhancing interest asserted by the state is illusory or illegitimate,

First Amendment interests are in equipoise, leaving the ultimate choice to the people as a matter of policy.

This Court has repeatedly recognized that when government seeks to enhance First Amendment values by increasing the ability of individuals to participate effectively in First Amendment activities, it may impose modest restrictions on autonomous behavior that would otherwise be protected by the First Amendment. The *White Primary Cases*, for example, imposed a limitation on associational autonomy in order to enhance the ability of members of racial minorities to participate in the democratic process. Moreover, in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), this Court upheld a state-imposed limit on the First Amendment autonomy of individuals to contribute unlimited sums to political campaigns because the restrictions were reasonably related to efforts to foster public confidence in the democratic process by removing the appearance of corruption. *Id.* at 907; *see also id.* at 912 (Breyer, J., concurring) ("The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many."); *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Similarly, in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*), this Court upheld regulations requiring the owners of cable television stations to broadcast the signals of over-the-air broadcasters because, although the content-neutral "must carry" regulations undoubtedly impinged on the autonomy of the cable broadcasters, they were reasonably related to enhancing the First Amendment interests of other participants in the cable broadcast process. *Turner* I, 512 U.S. at 663; *Turner II*, 520 U.S. at 224; *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675 (1998) (upholding modest intrusion into autonomy of public television broadcaster designed to enhance the ability of unpopular candidates to participate in debates); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990) (upholding independent expenditure limits on corporations

designed to protect against the "distortion" of state and local elections caused by massive wealth disparity).

When due weight is given to California's First Amendment interest in enhancing the capacity of large numbers of individuals to participate in the democratic selection of governing officials, petitioners' First Amendment argument collapses. The bulk of the Court's cases in this area do not involve an effort to expand the ability of individuals to participate in the democratic process. Thus, the *White Primary Cases* involved an effort by a political party acting without formal state assistance to *prevent* members of racial minorities from voting in its primary. *Rosario*, *Kusper*, *Nader*, and *Bullock* all involved efforts by the state to *limit* participation in a primary. Whatever the outcomes of such cases, they do not involve a state seeking to expand the right to vote. Similarly, *Eu* and *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), involved government efforts to *silence* political parties. Once again, whatever the outcome of such cases, they do not involve a state seeking to *enhance* First Amendment participation in democracy. And while *Eu* is phrased in terms of protecting party autonomy against government regulation, it is the autonomy to speak, not to exclude individuals from voting.

When this Court has been confronted with legislative efforts to expand the ability to participate in democracy, it has recognized the formidable nature of such an interest. Thus, in *Morse v. Republican Party*, 517 U.S. 186 (1996), the Court applied Section 5 of the Voting Rights Act to a major party's decision to alter its internal party rules governing nomination, despite the dramatic incursion on party autonomy caused by requiring a political party to pre-clear its internal rules. *Id.* at 186-87. *Morse* merely continued the Court's tradition of deference to legislative efforts to enhance participation in the democratic process that initially emerged in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

Not surprisingly, when the Democratic-controlled state legislature attempted to prevent the Republican Party of Connecticut from broadening the ability of nonmembers to vote in its primary, the Court struck down the state's effort to prevent such an expansion of the franchise. *Tashjian*, 479 U.S. at 229. To be sure, the *Tashjian* opinion is phrased in terms of party autonomy, but, as in *Eu*, it is the autonomy to enhance participation in the democratic process, not to restrict it.

The only case in which this Court has questioned the constitutionality of a legislative effort to expand the franchise is *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), where the Court declined to enforce Wisconsin's effort to bind delegates to the Democratic National Convention to vote in accordance with the results of the state's open presidential primary despite Democratic National Convention rules forbidding the selection of presidential delegates by open primary. *Id.* at 126; *see also Cousins v. Wigoda*, 419 U.S. 477 (1975) (holding that the Illinois state courts had no power to force the National Democratic Party to seat an Illinois delegation that violated the party's delegate selection rules). *LaFollette* is, however, a federalism case, not a general license to political parties to ignore legislative judgments in favor of open primaries. The Court stressed the extraterritorial nature of Wisconsin's attempted regulation of the Democratic National Convention, and noted that a single state lacked power to purport to engage in extraterritorial regulation of a presidential election that is uniquely national in scope. *Cf. Saenz v. Roe*, 119 S. Ct. 1518, 1526 (1999) (recognizing that the Privileges and Immunities Clause of the 14th Amendment limits state efforts to regulate certain uniquely national interests). Indeed, the *LaFollette* opinion is careful to avoid casting doubt on the use of the open primary in state and local elections.[18] 450 U.S.

18. California has avoided any collision with *LaFollette* by providing for presidential primary ballots coded by the party affiliation of the voter so that parties could calculate votes for delegates based solely on the votes of party members. *See* Cal. Elec. Code §§ 15151(3), 15375(C); 15500 (West 1999).

at 121. *LaFollette* is, therefore, the federalism analogue of *Oregon v. Mitchell*, 400 U.S. 112 (1970), where this Court ruled that Congress lacked the power to lower the voting age to 18 in state and local elections, but possessed the power to do so in federal elections. *Id.* at 130. Similarly, while California may not seek to engage in extraterritorial regulation of the presidential election, it possesses the constitutional power to expand the franchise in major party primary elections that take place entirely within the State of California.

II.

MINOR POLITICAL PARTIES MAY NOT BE COMPELLED TO PERMIT NONMEMBERS TO PARTICIPATE IN THEIR NOMINATING PROCESSES.

A. The State Has No Interest in Requiring Minor Parties to Permit Nonmembers to Vote in Their Primaries.

Because of their past and future control of nearly all elected bodies in California, the preferential treatment and benefits state and federal law accords them,[19] and the general bias in favor of the two established parties fostered by the winner-take-all electoral system used throughout the state, the Democrats and Republicans cannot use the First Amendment to shield themselves from a voter-initiated measure seeking to expand participation in the selection of their candidates. The state has a compelling interest in fostering participation by the governed (*i.e.*, adding to rather than subtracting from the totality of First Amendment activity in California politics) in elections that determine who will be their governors.

19. *See, e.g.*, 26 U.S.C. §§ 9003, 9004, & 9008 (1994) (establishing different rules for public funding of minor and major party presidential primary campaigns and conventions).

The same logic does not hold, however, for minor party primaries.[20] Minor parties in our democratic system do not deal in power; they deal in ideology and ideas. *See* Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, *Third Parties in America* 8-9 (1984). Thus, to the extent the government's power to regulate the primary elections of major parties flows from the fact that major party primaries are crucial way-stations on the road to power, that justification cannot be deployed in support of efforts to regulate the nominating processes of minor parties.

In its ballot access cases, this Court has described the distinct and "significant role that third parties have played in the political development of the Nation." *Illinois v. Socialist Workers Party*, 440 U.S. 173, 185 (1979). "Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining office." *Id.*; *see also Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) ("Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of the challenges to the status quo have in time made their way into the mainstream."); *Munro v. Socialist Workers Party*, 479 U.S. 189, 200 (1986) (Marshall, J., dissenting); *Williams v. Rhodes*, 393 U.S. 23, 38 (1968) (Douglas, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957). As the premier text on the subject of minor parties explains:

> [T]he power of third parties lies in their capacity to affect the content and range of political discourse, and ultimately public policy, by raising issues and options that the two major parties have

20. California has recognized five minor parties that have the right to place candidates on the primary ballot: the Green Party, American Independence Party, Libertarian Party, Natural Law Party, and Reform Party. *See* Cal. Elec. Law § 5100 (West 1999) (establishing rules for qualifying as a political party).

> ignored. In so doing, they not only promote their cause but affect the very character of the two party system. When a third party compels a major party to adopt policies it otherwise may not have, it stimulates a redrawing of the political battle lines and a reshuffling of the major party coalitions.

Rosenstone, *et al.*, *supra*, at 8-9.

California's minor parties are thus nearly pure First Amendment creations. They exist as banners of protest against the two major parties or as interest groups using the ballot box to promote a particular ideology, rather than as electoral institutions used principally to select governmental leaders. The state's interest in fostering electoral participation, which is dependent on a theory of democratic legitimacy holding that representatives in government ought to enjoy as much electoral support as possible, therefore cannot possibly apply.

B. States May Not Interfere with Minor Party Autonomy in the Absence of a Significant Government Interest.

Stripped of its participation-enhancing justification for regulation, California's effort to force minor parties to open their nominating processes to outsiders must fail, especially since the ideological complexion of most minor parties gives rise to an intense associational interest rooted in common commitment to a narrow ideology that cannot be matched by major "big tent" parties. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984) (emphasizing the size, selectivity, and seclusion of an organization in assessing its freedom of association).

Although this Court declined in *Buckley v. Valeo* to grant minor parties a blanket exemption from campaign finance regulation because they were unlikely to be in a position to exercise power, the Court recognized that the special status of minor parties in our system of democracy required a tailoring of the constitutional rules. 424 U.S. 1, 70-75 (1976). Thus, under *Buckley*, minor parties are permitted to exempt themselves from

contribution disclosure rules upon a showing that their controversial nature would pose a risk of retribution to financial supporters. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95-102 (1982) (applying *Buckley*'s differential standard for contributions to minor parties to law regulating campaign disbursements). Similarly, the *Buckley* Court recognized that the unique status of minor parties might render aspects of the campaign financing law unconstitutional as applied to them in subsequent litigation. *Buckley*, 424 U.S. at 74. This case poses a classic example of a statute that is constitutional on its face, and as applied to major parties, but that cannot constitutionally be applied to minor parties because the state lacks a credible interest in doing so. *See Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971) (explaining that "sometimes the grossest discrimination can lie in treating [parties] that are different as though they were exactly alike").

In *Tashjian*, this Court invalidated a Connecticut statute that forbade the state's Republican Party from permitting nonmembers to vote in its primary. Connecticut sought to justify the restriction by arguing that it was designed to protect the Republican Party against its ill-considered decision to permit outsiders to vote in its primaries. In fact, the prohibition was a thinly veiled attempt by the governing Democratic Party to prevent the Republican Party from seeking to expand its electoral base. Taking Connecticut's justification at face value, however, the prohibition would still be unconstitutional because the state simply may not purport to restrict the First Amendment activities of groups and individuals for their own good. Such an exercise in restrictive paternalism is not a legitimate reason to impinge on First Amendment behavior. Lacking a legitimate justification, the prohibition in *Tashjian* was clearly unconstitutional.

In this case, California has articulated a powerful justification for regulating major party primaries, not to protect major parties against themselves, but to open up crucial aspects of the electoral process to otherwise excluded voters. But that justification is absent as applied to primaries that are not integral

aspects of the choice of a governing official. As in *Tashjian*, therefore, California lacks a legitimate democracy-enhancing justification for its effort to regulate who can vote in a minor party primary. Accordingly, as in *Tashjian*, the statute is clearly unconstitutional as an intrusion on First Amendment behavior that cannot be justified by a correlative increase in the ability of others to participate more fully in the selection of governing officials.

C. California's Blanket Primary Severely Intrudes on Minor Parties' Protected Sphere of Autonomy.

Whereas average crossover voting into major party primaries approximated 15% to 20% of the total major party primary vote in the 1998 California primary, the story is quite different for the minor party primaries. Although contested races in minor party primaries are rare, the evidence from the 1998 primary demonstrates that the magnitude of the crossover vote can often make the participation by minor party members irrelevant.

Tables 1 and 2 describe the overwhelming impact of the blanket primary on minor party members' ability to nominate a candidate of their choice. Depending on the office, turnout in the 1998 primary dwarfed previous average levels by a factor between 3 and 20. In effect, the minor party primaries became fora in which major party members could determine in a systematic way who would "speak" for the party in the general election.

Table 1: Average Number of Votes Cast in Contested Minor Party Primaries in 1968-1996 versus those cast in 1998[21]

	1968-1996 average	1998	Increase
Governor N =	11,695 8	37,077 1	3:1
Lieutenant Governor N =	12,865 5	141,128 1	11:1
Secretary of State N =	6,357 2	127,609 1	20:1
Attorney General N =	(n/a) 0	137,946 1	(n/a)
Insurance Commissioner N =	5,400 1	159,307 1	30:1
U.S. Congress N =	536 16	4,343 1	8:1
State Assembly N =	314 33	3,469 1	11:1

21. The source for Tables 1 and 2 is Christian Collet, *Openness Begets Opportunity: Minor Parties and the First Blanket Primary in California*, *in* Cain & Gerber, *supra* note 13, at ch. 11. N refers to the number of contested minor party primaries used in computing the average turnout for a race for that office. Only the Peace and Freedom Party and the Libertarian Party had contested primaries in 1998.

Table 2. Share of Total Primary Vote Received by Minor Party Primary Candidates in California, 1994 and 1998

	1994	1998
Governor	0.2%	0.7%
U.S. Senate	0.2	0.8
U.S. House	0.3	2.2
California Senate	0.3	3.4
California Assembly	0.4	3.0

If the legal and political differences between major an minor parties are insufficient to warrant a distinct method of constitutional analysis, surely the differential impact both in kind and degree of the blanket primary cautions against applying a one-size-fits-all-parties approach. Of course, outsiders may also have cast decisive votes in major party primaries so as to alter who speaks for that party in the general election. However, the blanket primary for them does not systematically swamp any competitive primary race nor does it threaten the major parties' very reason for being. For the major parties, the blanket primary merely frontloads into the primary election the preferences of the entire electorate in their selection of who should win the office.

For minor parties though, their "voice" in the general election is really all they have. To allow members of the establishment parties to change its pitch and tone contracts, rather than expands, the totality of First Amendment activity occurring in California elections.

CONCLUSION

For the above-stated reasons, Proposition 198 should be upheld as applied to major party primary elections, but should be declared unconstitutional as applied to the primary elections of minor parties.

Respectfully submitted,

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In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE and FREEDOM PARTY, et al.,

Petitioners,

v.

BILL JONES, Secretary of State of California and Californians for an Open Primary, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF ALL PETITIONERS SUPPORTING REVERSAL OF NINTH CIRCUIT DECISION

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BRIEF AMICUS CURIAE*

I. INTRODUCTION

The Republican Party of Alaska, Inc.; The Alaska Libertarian Party; The Alaskan Independence Party; Wayne Anthony Ross; Mark Chryson and Linda S. McKay file this brief amicus curiae in support of the petitioners, urging reversal of the judgment of the District Court and the decision of the Court of Appeals for the Ninth Circuit. The counsel for both petitioners and respondents have consented to the filing of this brief amicus curiae. These consents have been mailed to the Clerk of this Court for filing.

The interest of amici in this case is that they are presently being harmed by being unable to choose their own candidates to represent their political parties in Alaska elections. They have had to deal with this situation for many years. The Republican Party of Alaska has been litigating this issue for over a decade, culminating in *Ross v. State of Alaska*, Docket No. 99-927, cert. den. (February 22, 2000). The rights of the amici have been harmed over a period of many years and will continue to be harmed in the future if their right to determine how their candidates are selected is not protected by this Court.

One of the tragedies of the situation in Alaska is that no court has ever allowed the amici to make a factual record as to how the political parties have been harmed and will continue to be harmed. In *O'Callaghan v. State*,

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* Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

914 P.2d 1250 (Alaska 1996), by a three to one decision, the Supreme Court of Alaska held that Alaska's blanket primary statute is constitutional, and that any interference between Alaska's blanket primary statute and the RPA's rights of free political association is minor and justified by the State's interests. In reaching this decision, the majority opinion placed the burden of proof on the RPA to show a substantial burden to its associational rights. *Heavey v. Chapman,* 611 P.2d 1256 (Wash. 1980). However, notwithstanding the fact that the majority placed the burden of proof on the RPA, the majority did not afford the RPA any opportunity to make a factual record before the trial court.[1]

The amici believe that the parties and other amici in the case at bench will be adequately discussing the law and the effect that depriving the political parties of their right to free political association will have in other states, nationally, and as a matter of general political theory, and will not be discussing these matters in this brief. The principal purpose of this brief is to show, in part, how the political process in Alaska has worked because the political parties have no control over who their candidates are or how they are selected.

II. THERE ARE SIX RECOGNIZED POLITICAL PARTIES IN ALASKA.

There are six political parties in Alaska which will be placing candidates on the 2000 Alaska elections ballots.

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[1] The RPA pointed out to the Supreme Court of Alaska that it was necessary for a remand to develop factual issues if the Court was going to abrogate the RPA's right to free political association. App. 25, n.16.

They are the Republican Party of Alaska (RPA), the Democratic Party of Alaska, the Alaskan Independence Party (AIP), the Green Party of Alaska, the Alaska Libertarian Party and the Republican Moderate Party.

The principal Alaskan political parties, holding the governorship, all Legislative and Congressional seats, and almost all other elective public offices in Alaska, are the Republican and Democratic Parties. As of February 29, 2000, out of a total of 458,759 registered voters, 111,853 are registered as Republicans and 75,863 as Democrats.

The Alaskan Independence Party has been recognized in Alaska since 1984. It presently has 18,773 registered voters. It elected the governor and lieutenant governor of Alaska in 1990, an election which will be discussed later in this brief at page 8.

The Green party of Alaska has been recognized since 1991. It presently has 3,309 registered voters. The Alaska Libertarian Party has been previously recognized, but has not been on the ballot for some time. The Republican Moderate Party is newly recognized, having received 13,540 votes (6.15% of votes cast) in the 1998 general election for governor. Both the Libertarian Party and the Moderate Republican Party will be newly appearing on the 2000 Alaska ballots. The Libertarian Party has 7,001 registered voters and the Republican Moderate Party has 1,254 registered voters.

Alaska is a state where many people do not register as a member of a particular political party. Of the remaining registered voters, 78,510 registered as non-partisan, 157,108 registered as undeclared (may or may not be a

member of a political party, but voter does not wish to declare which one), and 4,937 registered as members of groups not recognized by the State of Alaska.

III. ALASKA LAW ALLOWS PARTIES NO CONTROL OVER THE SELECTION OF THEIR CANDIDATES.

The political parties in Alaska have absolutely no control over how their primary election candidates are selected, who their candidates are going to be, or how the successful candidates are selected to continue to the general election. The Alaska law applicable to the rights and abilities of Alaskan political parties to select their candidates to represent their interests can be summarized as follows:

(1) The parties have no control over who will run as party candidates in their own primary elections. These candidates designate themselves as the party standard-bearers. (AS 15.25.030) A candidate may even change party registration on the same day as filing a declaration of candidacy.[2] The parties must allow these self-designated candidates to run under the party name, and

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[2] In fact, some years ago, Alaska had a candidate running for state office as a candidate of one of the major political parties. This candidate changed his party registration to that of the other major party ten minutes prior to the filing deadline, so that he could run for office as a member of the party that he secretly wanted to represent and that he would have no opponent from the other party. Although extreme, this is typical of the mischief that is sometimes performed under the Alaska method of candidate selection.

cannot get rid of them even if they are totally unacceptable to the party.

(2) The parties have no control over who may vote in their primary elections. (*O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996, AS 15.25.040 et seq.) In the past, candidates representing political parties in the general elections have been selected by voters of opposing parties through cross-over voting.

(3) The parties cannot even protect the use of their own party names to avoid confusion and misrepresentation. (*Republican Party of Alaska v. Metcalfe*, Case No. 3AN-86-11714 (Sup.Ct., 3rd Jud. Dist., Alaska 1986))

IV. THE STATE-MANDATED SELECTION PROCESS HARMS THE ALASKAN POLITICAL PARTIES.

The harm to the political parties in Alaska is caused by both parts of the process – the self-designation of candidates whom the parties cannot get rid of, and the fact that the parties have to participate in a primary election process in which they have no control over who the voters are going to be. Most of the harm to the parties is caused by a combination of these two limitations. Various types of harm to the parties which have occurred in the past and which will occur again in the future can be easily demonstrated.

(a) Cross-over voting.

A type of harm, which occurs on a regular basis in Alaska, is cross-over voting. This type of harm is principally related to the fact that the parties must participate

in primary elections in which voters of opposing parties may select party candidates. This may take place when a party has only one candidate for a particular office, and the opposing party has two or more candidates. Voters of the party with the single candidate will often vote for the weakest candidate of the opposing party in order to most easily defeat that candidate in the general election. This happens on a regular basis in Alaska, and will continue to happen in the future as long as the right to do so is still in place.

A classic example is the U.S. Senatorial elections of 1974 and 1980. In 1974, Mike Gravel was the only Democratic candidate. The two Republican candidates were C.R. Lewis, a leader of the John Birch Society, and Terry Miller, a moderate. Democratic cross-over voters gave C.R. Lewis the victory in the Republican primary election. As an extreme conservative, Mr. Lewis was unacceptable to most of the electorate. Mike Gravel, the Democrat, then won the general election.

Mike Gravel, the incumbent, and Clark Gruening were the two Democratic candidates in the 1980 United States Senate race. A Republican cross-over vote resulted in Clark Gruening defeating Mike Gravel. The Republican candidate, Frank Murkowski, then won the general election, and presently serves in the United States Senate. In this election, 72,368 persons voted Democratic, while only 27,632 persons voted Republican. There were six Republican candidates in that primary election. Nevertheless, Republicans crossed over into the Democratic primary election in order to defeat the incumbent senator, Mike Gravel.

A comparison of the vote in the 1980 senatorial primary with the vote in the 1978 gubernatorial primary, illustrates the magnitude of cross-over voting:

Primary Election	Republican	Democrat
1978 Gubernatorial	81,632	24,675
1980 U.S. Senate	27,632	72,368

Cross-over voting regularly appears in state races. For example, in the 1984 Alaska primary election for House District 14, Seat A, the only Democratic candidate was James Duncan. Ramona Barnes and Marco Pignalberi were the two Republican candidates. Ramona Barnes, the incumbent, was a senior legislator, and the leader of the Republicans in the Alaska House of Representatives. As such, she was a top Democratic target. In the blanket primary, James Duncan received only 329 votes. Marco Pignalberi defeated Ramona Barnes by a vote of 2816 to 1819. The extremely low number of voters in the Democratic primary election shows a massive Democratic cross-over which defeated the House Republican Leader.

In the 1990 primary election for Senate District F-B, no candidate ran as a Democrat. The Republican candidates were Jan Faiks, former Republican Senate President, and Virginia Collins, a Republican member of the House of Representatives. Jan Faiks, a Republican leader, was a Democratic target. Since the Democrats did not field a candidate, almost all Democrats crossed-over into the Republican primary election, resulting in Jan Faiks' defeat by a 53% to 47% voting margin.

Cross-over voters also affected the election for governor of Alaska in 1978. Democratic voters crossing into the

Republican primary election allowed Jay Hammond, a Republican legislator, to defeat Walter J. Hickel, former Secretary of the United States Department of the Interior and former Governor of Alaska. In the 1978 gubernatorial primary election, 24,675 individuals voted for Democrats and 81,632 persons voted for Republicans. Again, the low number of voters in the Democratic primary shows massive cross-over of Democrats into the Republican primary election.

The foregoing are examples only, and do not represent all of the instances of cross-over voting. The common practice of voting for the weakest candidate in your opponent's party does not promote good government, and needs to be stopped in Alaska.

(b) 1990 and 1998 Alaska Gubernatorial Elections.

The 1990 and 1998 Alaska Gubernatorial elections demonstrate the extremes of harm which can take place to a party if they have no right to designate how their candidates are selected. As a result of the selection process mandated by the State of Alaska, the Republicans were harmed so badly that Alaska has had an AIP governor for four years, followed by a Democrat governor for eight years, in a state in which the vast majority of voters are Republicans or conservative independents.

(1) 1990 Gubernatorial Election

The 1990 Alaska gubernatorial election was extremely interesting, and a disaster for the Republicans. As a result of the state-mandated candidate self-selection

and primary process, Arliss Sturgulewski was selected as the Republican candidate for governor and Jack Coghill selected as Republican candidate for lieutenant governor. The Alaskan Independence Party candidates were John Lindauer for governor and Jerry Ward for lieutenant governor. Ms. Sturgulewski was unacceptable to most Republicans, and Ms. Sturgulewski and Mr. Coghill were unacceptable to one another. This fact became obvious almost immediately.

Mr. Coghill, Walter J. Hickel (former governor of Alaska and former U.S. Secretary of the Interior), and the Alaskan Independence Party entered into an agreement whereby Mr. Lindauer and Mr. Ward removed themselves from the ballot, and Mr. Hickel and Mr. Coghill ran for governor and lieutenant governor as candidates of the AIP. A large Republican cross-over to AIP in the 1990 general election resulted in Mr. Hickel and Mr. Coghill, AIP candidates, being elected governor and lieutenant governor of Alaska.

In this election, the state-mandated selection process resulted in a major candidate, unacceptable to most of the Republicans themselves, to be the Republican party standard-bearer. In order to protect themselves from that, Republicans had to purposely harm themselves in order to avoid the unacceptability of their own candidate. The harm itself turned out to be more serious than anticipated. Not only did Republicans lose certain appointments and positions, such as membership on the Alaska Public Offices Commission, which go to members of the governor's party, Mr. Coghill's election gave him a position from which to run for governor in 1994. Mr. Coghill's run for governor in 1994 fractured the Republican and

conservative vote, resulting in the election of Tony Knowles, a Democrat, as governor of Alaska – a state in which the vast majority of voters are Republicans or conservative independents.[3]

(2) 1998 Gubernatorial Election.

The 1990 gubernatorial election was tragic for the Republicans. The 1998 gubernatorial election was much worse.

In 1998, John Lindauer came to Alaska with millions of dollars in Chicago money to buy the governorship. This is the same John Lindauer who ran for governor as an AIP in 1990. This time, he decided to run for governor as a Republican.

The major candidates in the Republicans gubernatorial primary election were John Lindauer, Robin Taylor, and Wayne Ross. Mr. Taylor and Mr. Ross were conservative Republicans who had been active in the Republican Party for many years. Mr. Taylor is a State Senator and Mr. Ross was a member of the Republican National Committee. Mr. Lindauer had access to out-of-state money and was able to spend millions of dollars to become governor. Mr. Ross and Mr. Taylor had difficulty

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[3] In Alaska, very close elections are common. Accordingly, allowing voters of opposing parties to vote in a party's primary election grants these voters an unusually great power to affect the outcome. For this reason, the right of a party to exclude members of other parties from voting in the party primary election is more important than it may first appear.

raising money because of the Alaskan Campaign Finance Act, and could not compete financially with Mr. Lindauer. In addition, Mr. Ross and Mr. Taylor split the conservative Republican vote. Mr. Lindauer was selected as the Republican candidate. He would have lost to either Mr. Ross or Mr. Taylor had only one of them been running.

In this Republican primary election, a classic cross-over voting situation existed. The Democrats had one strong candidate, Tony Knowles for reelection, running in the Democrat gubernatorial primary election. His victory was certain. Mr. Lindauer was known to be the Republican candidate whom the Democrats could defeat most easily. Cross-over voting took place in the Republican primary, which assisted in the victory of Mr. Lindauer, although it cannot be said that this was the only reason that Mr. Lindauer won the Republican gubernatorial primary. His unlimited money was another major reason.

Once Mr. Lindauer won the Republican primary, his candidacy began to disintegrate almost immediately over questions relating to his residence, the source of his money, his integrity, and his continued lying. Chuck Achberger, a former employee of the Lindauer campaign, filed a complaint with the Alaska Public Offices Commission, over Mr. Lindauer's finances and his required reporting. An independent voter, Frances Grady, filed a lawsuit in the Alaska Superior Court, dealing with the same issues. (*Grady v. State*, Case No. 3AN 98-9720 CI) Both these complaints requested that Mr. Lindauer's name be removed from the general election ballot. Neither the Alaska Public Offices Commission or the court

resolved the proceedings before them prior to the 1998 general election.

The disintegration of the Lindauer campaign affected not only his campaign, but also the campaigns of Republican candidates across the board. It also affected the credibility and integrity of the Republican Party itself. Fewer than two weeks prior to the general election, after some weeks of the only issue being "Lindauer", the Republican Party accepted the fact that it had to write-off any chance to elect a Republican governor in 1998. The RPA had to disavow Mr. Lindauer in order to save the party from a massive defeat across the entire spectrum of elective offices. The RPA withdrew its endorsement from Mr. Lindauer and recommended that voters write-in Mr. Taylor for governor. Mr. Taylor, who received the second-highest number of votes in the Republican gubernatorial primary, was the logical selection.

The Republican Party of Alaska had never before been forced to withdraw an endorsement of one of its gubernatorial candidates in a general election. In 1990, the rejection of Ms. Sturgulewski was by the Republican voters themselves. The 1998 rejection of Mr. Lindauer had to be done by the Party in order to preserve its own integrity and protect its legislative races, which were in serious danger if the RPA continued to support Mr. Lindauer. This in fact was done at great personal risk to party officers. Immediately after rejecting Mr. Lindauer, the party officers, Mr. Taylor, and the son of Mr. Achberger (who filed the first APOC complaint) who worked for the RPA as office manager, and others, were sued personally for multi-millions of dollars for "conspiracy to destroy Republican nominee's for Governor election on November 3, 1998" (*Lindauer v. McKay, et al.*, Case

No. 3AN 98-10195 (Sup.Ct., 3rd Jud. Dist., Alaska 1998)) and threatened with criminal prosecution. Not only could the RPA not get rid of a totally unacceptable candidate for governor, it was claimed that its officers were personally civilly and criminally liable for trying to do so.

The RPA objected and continues to object to a statutorily-mandated election process which forces it to accept a candidate such as Mr. Lindauer as its standard-bearer in the general election.[4]

The 1990 gubernatorial election also harmed the Alaskan Independence Party. A blanket primary is, in fact, most destructive to the minor parties. These parties have relatively small numbers of registered voters. The massive numbers of voters of other persuasions, should they vote for a minority party candidate, can simply overwhelm the minor party, and easily deny those parties' members the rights to choose their own nominees. The winner of the 1990 AIP primary election for governor was Sylvia Sullivan. Ms. Sullivan was a Democrat, who

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[4] After the 1998 general election, the Alaska Public Offices Commission, in ruling on the Achberger complaint, found numerous campaign law violations and referred the Lindauer matter to the Attorney General's office to consider criminal prosecution. In August, 1999, the Attorney General of Alaska filed a complaint charging Mr. Lindauer with twenty-three (23) violations of law which occurred during his campaign, including twenty-two (22) Class A misdemeanors and one felony. *State v. Lindauer*, Case No. 3AN 99-7041 CR. Mr. Lindauer subsequently pleaded guilty to several charges and was sentenced to fines and community service. He agreed not to seek public office in Alaska again and published an apology in Alaskan newspapers.

changed her party registration to AIP solely for the purpose of running for governor as an AIP candidate. She would not subscribe to the platform and beliefs of the AIP, and would not even attend AIP meetings. The AIP objected to Ms. Sullivan as its candidate, refused to endorse her, and actually endorsed the Republican candidate, John Lindauer. The AIP supported a write-in candidate, Nick Begich, in order to get its principles before the public from a stance of credibility. Voters of other political parties assisted in the victory of a Democrat in the AIP gubernatorial primary. The AIP objected, and continues to object, to the blanket primary election system which selected Ms. Sullivan, a Democrat, as its gubernatorial candidate.

To summarize this election, a state-mandated selection process resulted in gubernatorial candidates of the RPA and the AIP which were *totally* unacceptable to those parties. The parties could not get rid of them, as unacceptable as they were, but were forced to accept them as the party standard bearers on the general election ballot. The AIP rejected its candidate to endorse the Republican, and also supported a write-in candidate. The RPA rejected its candidate to support a write-in candidate. Both parties knew that by doing so, they would lose any chance at the governorship. But the state-mandated selection process, to which both parties objected, saddled them with candidates where the alternative of throwing away the possibility of electing a governor was preferable to supporting the candidates foisted on them by the state. This does not protect the right of free political association in any way!

V. THE REPUBLICAN LEGISLATORS WILL NOT ASSIST THE RPA ON ISSUES CRUCIAL TO THE PARTY.

In the Legislature presently in session, of the 20 Senate members, 15 are Republicans and 5 are Democrats. Of the 40 House members, 27 are Republicans and 13 are Democrats. This constitutes a majority sufficient to override even a veto of a bill by the governor.

One of the purposes of the right of political association is to elect representatives to further the principles and obtain the goals sought by the members of the political party. This brief will not discuss Legislative treatment of the principles of the Republican Party, or even the political goals that the Party desires to obtain, but simply the issues which are critical to the basic survival and strengthening of the Party itself. One would think that with a veto-proof majority of legislators who call themselves Republicans, the Party itself could obtain necessary protection in order to minimally allow the Party to effectively function.

Think again! The candidate self-designation and primary election process mandated by the State has resulted in a Legislature that specifically tries to weaken, rather than strengthen, the Republican Party itself, without reference even to whether it supports the Republican Party platform and principles. The following are some clear examples.

(1) **Party Name**. For many years, the RPA has been aware of the threat posed by the Republican Moderate Party, and has requested that the Legislature protect the Party by enacting a statute such as Del. Code Ann. tit. 15,

§ 3202 (1999), which protects the rights of the Democratic and Republican parties to the exclusive use of these names to protect the parties against misleading use of the names by other groups. The Legislature has continuously refused to do so. This refusal will come home to roost later in 2000, now that the Republican Moderate Party will appear on the ballot.

The avowed and published goal of the Republican Moderate Party is to deny each of the other parties a majority in the Legislature, and force the formation of a coalition of all parties run by the Moderates. It may only take a few seats to do this. Such a result substantially harms the true Republican Party.

This will bring back the "coalition" problem, which the RPA actually managed to get rid of in 1992. Historically, Republican legislators abandoned their Republican colleagues by joining leadership coalitions dominated by Democrats. In the 1990 election, enough Republicans were elected to form a Republican majority in the Alaska Senate. However, certain Republicans desired benefits for themselves, which they might not have received from the Republican majority. Accordingly, three Republican legislators abandoned their Republican colleagues and entered into a coalition dominated by Democrats in order to obtain leadership roles for themselves.

The 1992 primary election was conducted in accord with Republican Party rules and not state law. As a result, none of the three 1990 defectors were re-nominated as Republicans. Democrats could not reward the Republican

defectors with votes in the Republican primary. Republican voters elected other candidates, and there has not been a defection since. In fact, largely because of the discipline imposed by the primary rule, Republican legislators have been in the majority in both the Alaska House and Senate since the rule was implemented. There has not been a "coalition" problem subsequently because the number of legislators self-designated as Republicans has increased substantially, but the Party does not want these coalitions to return.

The Legislature, however, will not enact a statute protecting the Republican Party in the exclusive use of its name.

(2) Party Control of Candidate Selection Process. Ever since 1990, the RPA has requested the enactment of a statute either (a) authorizing a Republican primary election from which registered voters of other political parties (the enemy) were excluded, or (b) stating that each political party had the right to determine how its candidates were to be selected. The Legislature has continuously refused to recognize the parties' preferences, instead forcing all parties into a candidate self-designation, blanket open primary system, a system unacceptable at least in part to almost all the political parties in Alaska.

Such a system weakens the political parties, while strengthening the individual candidates. In particular, candidates do not have to be responsible to anyone in order to get on the ballot or be elected. They are responsible to no one for their behavior after election. It is easy to understand why the political parties want to determine

how their candidates are selected, and why the candidates do not want them to do so.

(3) Instant Run-Off Voting (IRV). The Number One Legislative Priority for the Republican Party during the 1999-2000 legislative session is instant run-off voting, also sometimes called preferential voting. This is also a priority of some of the other political parties. Basically, the process allows a voter to rank candidates for any particular office at first, second, third choices, etc. If any candidate receives a majority of first choices, that candidate is elected. If there is no majority, the candidate receiving the fewest first choice votes is eliminated, and votes cast for that candidate are transferred to the next ranking candidate listed on each of these ballots. This process continues until one candidate receives a majority.

This process creates a majority, without the expense of a run-off election. It does not allow a candidate unacceptable to most of the voters to be elected. It strengthens the minor parties in that their voters may vote their true beliefs, without their votes being wasted. It eliminates the problem of multiple candidates splitting the vote and throwing the election to more unpopular candidates.

The Republican Party needs this process enacted by legislation for two reasons. First, the RPA anticipates that their will be a substantial split of the conservative and independent votes in the 2000 election between the Republicans, the AIPs, the Libertarians and the Republican Moderates. This will result in Democrats being elected. Second, the system requires a constitutional amendment to be applied to the office of governor, and a

constitutional amendment must be initiated by the Legislature. The parties feel so strongly about this system that an initiative petition, sponsored by a Republican District Chairman, the chairman of the Alaskan Independence Party, and a former Chairman of the Green Party of Alaska, is presently being circulated to implement this system for offices other than governor.

Can we all get this necessary reform from the Legislature this session? – perhaps, but probably not. Certain legislators are looking at the way they believe this reform will affect their own reelections, and not how the parties as a whole will benefit. This again results from the state-mandated method by which these legislators were selected. They won under the old way – there is no reason to change.

(4) Campaign Finance. The Alaska Campaign Finance Act creates serious problems for the political parties and certain individuals, including the writer of this brief. These problems are unrelated to monetary contributions for the direct benefit of candidates, which this Court recently held were subject to state regulation, but deal with contributions of personal services to parties and payments which are not related to candidates.

The Alaska Campaign Finance Act limits contributions made "for the purpose of influencing the nomination or election of a candidate". It also limits professional services for which the donor would ordinarily be paid. (AS 15.13.400(3)) The Alaska Public Offices Commission has held that, since the purpose of a political party is to elect candidates, all contributions made to a political party are, as a matter of law, for the purpose of electing

candidates. This has led to such results as the membership chairman of the Alaska Libertarian Party being in violation of the law by voluntarily preparing and distributing his party newsletter, and the attorney Republican National Committeeman being in violation of the law because he took his legal assistants to a Republican Women's lunch where a C.L.E. program was being presented on how to comply with the Alaska Campaign Finance Act. I am the legal counsel of the Republican Party, and donate my legal services to the Party as part of the duties of that Party office. This has resulted in my regularly committing criminal acts, such as (1) paying for lunch at a Party Committee meeting, (2) replacing a flag that had been stolen from the front of the Party headquarters, and (3) the preparation of this amicus brief. The parties themselves, as recipients of these benefits, are also in violation of law. These issues are presently before the U.S. District Court for the District of Alaska in *Jacobus v. State*, DC# CV 97-272 (JKS). But they should not have to be before a court.

I had originally thought that what I believed were unintended consequences of the Campaign Finance Act would be cleared up quickly by the Legislature, particularly since one of their own forgot to file a required disclosure report which put her right to hold office in jeopardy, and they solved that problem in a matter of days by amending the applicable statute. Also, this Act clearly infringes upon clearly protected rights of parties and individuals who help the parties, without reference to candidates, and it is necessary that these problems be resolved. Finally, the limitations placed on the Party by

the Act in its present form make it extremely difficult for the RPA to even pay its rent, utilities, etc. and survive.

Resolving these Campaign Finance Act issues is the Number Two Legislative Priority of the Republican Party. The Party and I have tried for years to obtain Legislative relief. None is forthcoming. The Republican Party and I are now starting our fourth year as career criminals, and the RPA is starting its fourth year broke. The other parties and other individuals must have similar problems.

In summary, there obviously is a problem in the selection process if the state-mandated selection process results in a Legislature, with a veto-proof Republican majority, which will not decriminalize personal services rendered to the Party it is supposed to represent, and the Party is allowed to continue to exist as an indigent criminal association.

CONCLUSION

This Court has repeatedly held that one of the basic rights of free political association is the right to nominate candidates of the party's choice. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) involved the selection of Republican candidates to run in the general election. The State of Connecticut wanted to keep the candidate selection process closed, while the party wanted to allow certain non-party members to vote. *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107 (1981) involved the delegate selection process of a national party for national conventions.

The State of Wisconsin wanted to keep the delegate selection process open, while the party wanted to close the process to outsiders. In both *Tashjian* and *LaFollette*, this Court held that the parties' desires prevailed over the states' interest in opening or closing the candidate or delegate selection process. In *LaFollette*, 450 U.S. at 124, n.27, this Court specifically stated:

> It is for the National Party – and not for the Wisconsin Legislature or any court – to determine the appropriate standards for participation in the party's candidate selection process.

Most recently, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), this Court reaffirmed *Tashjian*, stressing that "[t]he New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes. . . . That is, the New Party, and not someone else, has the right to select the New Party's 'standard bearer' "

The amici recognize that a different candidate selection method is appropriate for different types of parties. A new small party, such as the Libertarians or Republican Moderates, may need to use a candidate selection process which is different from the process used by the Republicans or Democrats. A blanket open primary election where the candidates designate themselves is simply not a size which fits all, and in fact is probably a size which fits no one. The parties themselves should be allowed to decide, however.

I have been authorized to state that the Republican Moderate Party desires to have at least a review and veto power over its candidates. It wants to be sure that the

candidates running under the name of Republican Moderate are honest, and truly represent the principles of that party. A former chairman of the Green Party is a strong supporter of instant run-off voting, and a sponsor of the petition. I cannot speak for the Democrats. It is clear, however, that the present state-mandated system is not working, is not acceptable, and is clearly harming the political parties in Alaska.

The amici request that this Court rule, in accord with its prior decisions, that the parties themselves have the right to determine how their candidates are to be selected, whether by primary election, by party convention, or by some other manner. The right to free political association, at a minimum demands this.

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IN THE

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

BILL JONES,
Secretary of State of California, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AND THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. It stands for, among other things, the fundamental right of persons to associate for the development, communication, and furtherance of shared viewpoints and beliefs. Eagle Forum ELDF's mission is to enable conservative and pro-family men and women to participate individually and collectively in the process of self-government and public policy making so that America will continue to be a land of individual liberty, respect for family integrity, public and private

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

virtue, and private enterprise. Eagle Forum ELDF zealously pursues this mission through education and participation in significant legal cases.

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life." The Institute pursues its mission through academic research, publications, scholarly conferences, and, through its Center for Constitutional Jurisprudence, the selective appearance as amicus curiae in cases of constitutional significance, including *Boy Scouts of America* v. *Dale* and *United States* v. *Morrison*, currently pending before this Court. Of particular relevance here, the Institute recently held a major conference on the role of political parties in the American constitutional system and has published extensively about the foundations of representative government and the constitutional protections of speech and association that are necessary to protect those foundations.

This case is of particular importance to amici because California's Proposition 198 effectively commandeers private associations and puts them into the service of an enforced public orthodoxy. The law compels political parties to open their doors to their ideological opponents and allows those opponents to compel each party to endorse candidates other than those whom the party members themselves desire to represent them. This grotesque assault on the core freedoms of political speech and association offends the Constitution.

STATEMENT

In order fully to appreciate the constitutional problems raised by Proposition 198, this Court should consider it within the context of the other California election laws. Resolution of this case turns on the interplay among Proposition 198 and those other laws, which results in a synergistic First Amend-

ment violation even though each law might be acceptable standing alone or in some other context.

There are two methods of gaining access to the ballot for most state and federal elective offices in California. The first method of ballot access is to receive the "nomination" of a qualified political party. California law "requires each party to select its candidate through a primary." *California Democratic Party* v. *Jones*, 984 F. Supp. 1288, 1300 (E.D. Cal. 1997), *aff'd* 163 F.3d 646 (CA9 1999).[2] "The person who receives the highest number of votes at a primary election as the candidate of a political party for the nomination to an office is *the nominee of that party* at the ensuing general election." Cal. Elec. Code § 15451 (emphasis added.).[3] The second method of ballot access is to obtain the signatures on a nominating petition of either 1% or 3% of the registered voters eligible to vote for the office being sought. § 8400. Anyone satisfying the petition requirement is listed on the ballot as an "independent" candidate, regardless any party affiliation. A candidate who sought but failed to receive a party nomination through the primary may not thereafter obtain ballot access by petition. § 8003.

This case involves a change to the direct primary by which the State requires qualified political parties to nominate candidates for public office. Because the purpose of the primary is to select a nominee for each of the several political parties, this is a "partisan" primary. Under a partisan primary system, therefore, each state-approved political party is given access to the general election ballot, and any particular candidate gains access to the general election ballot only by virtue of being a qualified party's nominee.

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[2] Because the Ninth Circuit adopted the district court opinion as its own, we will hereinafter cite directly to the district court opinion.

[3] Citations to the California Election Code will hereinafter be to the section number only.

Partisan primaries may be contrasted with "nonpartisan" primaries, which do not select *nominees* for political parties. Instead, nonpartisan primaries simply narrow the candidate field by subjecting candidates to an initial public vote, and then advancing a smaller group of the top vote recipients, regardless of party affiliation, to the final election ballot.[4]

Partisan primaries are of several types – closed, open, and blanket – and much of the discussion in the court below involved comparing these different types and their relative impacts on parties. Both closed and open primaries offer electors a primary ballot containing only the prospective nominees of a single party. In a closed primary the voter must be a member of the party among whose potential nominees he is choosing, but in an open primary the voter may select the primary ballot for any single party, regardless of whether he is a member of that party. 984 F. Supp. at 1291. Open and closed primaries are, by definition, partisan in that they result in the selection of party nominees.[5]

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[4] Louisiana uses nonpartisan primaries to narrow the field for its final ballot. 984 F. Supp. at 1292. Several elective offices in California are likewise chosen through nonpartisan primaries and runoff elections. *See Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 219 (1989) (referring to "nonpartisan school, county, and municipal elections"). Those California primaries are not at issue in this case.

[5] Most of the debate over the degree of openness or closedness turns on how one goes about establishing "membership" in a party prior to asking for that party's ballot. If a State has made "membership" in a party less meaningful and easily switched before and after an election, there is less of a distinction between open and closed primaries. Both are nonetheless partisan and limit a voter to a single party's nominating ballot. Furthermore, even in an open primary, many persons take their choice of a party ballot as a political statement, and the parties may well find value in such an indication of affinity. Indeed, in some states some parties voluntarily use an open or open-to-independents primary as a means of drawing in potential supporters. But the *voluntary* use of an open primary by a party is merely an exercise of freedom of association, not a compulsion of association.

The third type of partisan primary is a blanket primary. In a partisan blanket primary the voter may vote for any candidate from any party on an office-by-office basis without being limited to a single party's ballot. *Id.* at 1291-92. The candidates themselves, however, are competing only against others from their own party for that party's nomination. The voter is thus voting only to determine a single party's nomination decision with any given vote and can essentially switch parties with each individual vote.

In contrast with the various types of partisan primary, there also exists a species of *nonpartisan* primary. A nonpartisan primary is necessarily of the "blanket" type because any voter can vote for any candidate as there is only one comprehensive ballot. The nonpartisan blanket primary differs from all three types of partisan primary, however, in that it is not designed to select the nominees of a particular party, and access to the final ballot does not turn on party affiliation or endorsement. A nonpartisan primary is simply a preliminary test of support for each of the candidates, which is then used to winnow down the final field for the general election. *See* 984 F. Supp. at 1292 (Louisiana's "nonpartisan primary differs because '[t]he two top vote receivers, regardless of party, meet in a subsequent (runoff or general) election.'") (quoting expert witness report).

Prior to Proposition 198, California held closed primaries. Under Proposition 198, however, "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote ... at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation." § 2001. Because the results of the primary still only determine the nominees for each party, Proposition 198 changes the system from a closed primary to a partisan blanket primary.

It is the synergistic effect of the "blanket" nature of Proposition 198 and the partisan nature of the primary required by § 15451 that raises the constitutional issue in this

case. The voters now allowed to cross party lines are not merely framing the choice of candidates on the final ballot, they are selecting *party nominees*.

SUMMARY OF ARGUMENT

By allowing voters to cross party lines, office-by-office, in a partisan primary, Proposition 198 compels party members to associate with persons who do not share their political and ideological goals and who do not have the interests of the same party at heart. Because such cross-over voters can influence, and sometimes determine, who shall be the nominees of parties not their own, and because the parties are then compelled to identify such nominees as *their* own, Proposition 198 compels expressive association and speech in violation of the First Amendment. In simplistic terms, it allows Democrats to choose the Republican nominee, Republicans to choose the Democratic nominee, and independents to choose the leaders of parties that they refuse to associate with at all. Such a system, when imposed upon unwilling parties, is a severe and unconstitutional burden on the freedom of speech and association.

Amici will focus on the relationship between private partisan speech and association and the constitutional presuppositions of our republican democracy. Both the text and the structure of the Constitution reflect the essential sovereignty of a free People. They also reflect the checks and balances designed to ensure that the People remain free to play their democratic roles yet not fall victim to the passions or desires of temporal majorities, no matter how well-intentioned. The First Amendment thus protects free speech and association so that the People remain free to generate a diversity of viewpoints and that dissident views be allowed to flourish.

Freedom of speech and association not only ensures the free development and transmission of viewpoints essential to the freely given consent of the governed, but also provides one of the few acceptable checks on the various factions that

are inevitable in a free society. In the Founders' view, factions were to be controlled not by seeking to eliminate them, but by ensuring a multiplicity of factions such that each would hinder the others from gaining a controlling majority. It was through a broad freedom of speech and association, and the encouragement of multiple competing factions, that our republican democracy was designed to endure. These structural principles call for rigorous protection of First Amendment freedoms, most especially in the context of political speech and association.

In this case, Proposition 198 as superimposed upon California's partisan primary system creates a severe and content-based burden on the First Amendment rights of political parties and their members. The resulting partisan blanket primary compels parties and their members to allow their ideological adversaries to participate in the selection of party standard-bearers and compels parties to nominate as candidates persons they may not endorse. And it does so with the express purpose of altering the *viewpoint* of the parties' speech. The law should thus be analyzed under strict scrutiny applied in the traditional, and almost invariably fatal, manner. And even were the Court to apply *ad hoc* balancing, the nature of the burden is such that only a compelling and necessary state interest could balance the scales.

The alleged state interests in this case do not justify the constitutional burden imposed by Proposition 198. The burdensome aspects of a partisan blanket primary are completely unnecessary to reach the State's claimed goals. There is no intrinsic connection between manipulating the party *nomination* process and ensuring ballot access for more popular or representative candidates or allowing enhanced voter participation. To accomplish such goals the State need only adopt a *nonpartisan* blanket primary, allowing universal voting and advancing a limited number of the top vote-getters regardless of party nomination. Such a system would neither rely upon nor interfere with political party endorsement processes. Par-

ties would remain free to identify their "nominees" for office, but would have no guarantee that their nominees would receive sufficient votes to make it onto the final ballot.

Aside from not necessitating the burden on First Amendment rights, the alleged state interests themselves are neither compelling nor sufficient to outweigh that burden. If anything, by trying to streamline the process through which the supposedly "moderate" majority may elect more candidates of like mind, California creates the very situation the Founders feared – one in which a majority faction can more easily form and impose its will on all others. Those attributes of the political system that the State describes as vices – members of different parties taking conflicting positions, no single set of candidates appealing to a majority of the population, legislative gridlock – are the very checks and balances that the Founders viewed as the unique virtues by which our republican democracy would avoid the pitfalls of faction that were fatal to so many democracies of the past.

ARGUMENT

There is no inherent connection between party nomination and access to the ballot. Any dependence of ballot access upon party nomination is artificially imposed by state law. Upon conceptually disentangling these two activities, it becomes apparent that, while the State may reasonably regulate ballot access, it may not do so at the expense of manipulating or interfering with party nominations.

I. The Role of Private Associations in a Republican Democracy.

The United States Constitution embodies a unique vision regarding the sovereignty of the People and the means by which the People exercise that sovereignty. Not only do the People exercise their sovereignty by periodically voting for representatives in local, state, and federal government, they

also exercise it on a daily basis by utilizing their constitutional rights to freedom of speech and association. The most significant means by which the People exercised their sovereignty, however, is through the Constitution itself, being ordained and established by "We The People of the United States." U.S. Const., preamble.

The timeless sovereignty of the People is best reflected in the First Amendment, which this Court has often recognized as the premier safeguard of genuinely free political decisions and free consent of the People. *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) ("*Eu*") ("the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (citation omitted); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 n. 12 (1978) ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' ... And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'"). The First Amendment thus plays a "structural role" in "securing and fostering our republican system of self-government." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 587 (1980).

The free formation and advocacy of opinion so essential for valid popular consent to republican government has long been recognized to require protection not just for specific instances of speech or religious exercise, but also for the "ability and the opportunity to combine with others to advance one's views." *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 13 (1988). Such protected association preserves "political and cultural diversity and ... shield[s] dissident expression from suppression by the majority." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984). Indeed, the First Amendment is designed to prevent temporal majorities from entrenching themselves and to ensure an avenue for

dissident or immoderate views that may someday capture the imagination and lead to a new direction.

A textual and structural understanding of the ongoing role of the People as sovereigns and as a source of diverse views that enrich and check government calls for a limited view of government power as it relates to belief, expression, and association. The Court thus should vigorously safeguard First Amendment freedoms at every step of the way, not letting past indirect encroachments pave the way for a final step into a more fulsome appropriation of the People's sovereignty.

II. A Partisan Blanket Primary Severely Burdens First Amendment Rights.

A primary election simultaneously blanket and partisan in nature is a creation at war with itself. On the one hand it seeks to give all voters a comprehensive choice among candidates in the primary, regardless of voter affiliation. On the other hand, it insists that the general election ballot be limited to those candidates endorsed, one each, by the political parties. The combination of these inconsistent notions leads to the undifferentiated electorate deciding who each of the differentiated parties must endorse. Therein lies the constitutional violation because the parties and their members have a First Amendment right to differentiate their speech and their associations.

A. Political Parties Are Private Expressive Associations Entitled to Full First Amendment Protection.

Political parties are perhaps the archetypal examples of expressive associations engaging in core First Amendment activities. *See Eu*, 489 U.S. at 222-23 (party endorsements are "speech which 'is at the core of our electoral process and of the First Amendment freedoms'") (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968)); *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) ("'The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.'") (quoting *Kusper* v. *Pontikes*, 414 U.S. 51, 57 (1973)). One of the most essential of these activities is the selection of individuals to endorse and promote for election to government office. *Eu*, 489 U.S. at 223 ("a political party has a right to identify the people who constitute the association ... and to select a standard bearer who best represents the party's ideologies and preferences") (citations and internal quotation marks omitted). There are few expressive activities more directly tied to the sovereign right of the People to combine in order to advocate shared views and engage in the process of self-government.

The State would have us believe that political parties are not private expressive associations, but rather are arms of the State itself, at least insofar as their interaction with the election process is concerned. *See, e.g.,* Appellee's and Intervenor's Brief, *California Democratic Party* v. *Jones*, June 25, 1998 (CA9 Nos. 97-17440, 97-17442) (hereinafter "Appellee's Br."), at 5-6 ("Because of the role the State confers upon political parties in the electoral process, they are not simply private actors. Only parties get automatic ballot placement for their candidates ...."); *id.* at 26 (characterizing political parties as "State actor[s]"). As the court below observed, therefore:

> This case presents two competing views as to the function of the direct primary and, to some extent, as to the function of the political parties. From the parties' perspective, the parties are autonomous organizations and the primary is their opportunity to select their leaders and to define their positions on political questions. From the defendants' perspective, the primaries are the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders, and the political parties, as they operate to frame the choice of candidates, are a part of a highly regulated governmental activity – the election process.

784 F. Supp. at 1293.

The competition between views is, however, an artificial one. Any "state" character assigned to the parties is due to the State's laws, not to the inherent character of the parties themselves. Indeed, the only formal role of the parties in the election process actually consists of the State co-opting private expressive associations for government use. But despite being used as proxies for the State with regard to determining ballot access, these private entities retain their First Amendment rights. Any clash between the exercise of those rights and the role the State would rather they play cannot form the basis for denying First Amendment rights. If the State will not yield its interest to the Constitution, then it must cede its use of private entities to perform the governmental function of regulation ballot access.[6]

What this Court recently has said concerning Congress and the States, so too it might say concerning the relationship between *all* republican government and the private associations of the People: Government "may not treat these sovereign entities as mere prefectures or corporations," but rather must accord "the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty" in the People. *Alden* v. *Maine*, -- U.S. --, --, 119 S. Ct. 2240, 2268 (1999).

Recognizing that political parties have full First Amendment rights for their expressive and associative activities helps place in perspective the relevant First Amendment jurisprudence. For example, in *Timmons* v. *Twin Cities Area*

[6] The claim that the parties themselves benefit from certain aspects of their involvement with the State is no answer to the constitutional problem. Granting qualified political parties the "great advantage[]" of "automatic access for their candidates," Appellee's Br. at 26, is more accurately described as imposing the great disadvantage of restricted access upon non-qualified parties and independents. Requiring parties to alter core aspects of their speech and expressive association under threat of restricted ballot access is thus an unconstitutional condition upon such access.

New Party, the Court stated that regulations "imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." 520 U.S. 351, 358 (1997) (citations and internal quotation marks omitted). While the court below seems to have read *Timmons* as adopting a more lenient test for election regulations, the standard used is hardly different from the time, place, and manner jurisprudence applied in other First Amendment contexts. Viewed as of a piece with general First Amendment law, the notions of severe and limited burdens on speech are seen as requiring an inquiry into the nature of the constitutional burden, not just the substantive effect on parties – they require a qualitative test, not merely a quantitative one. Thus, a restriction based upon content or viewpoint, or that discriminated on the basis of the exercise of First Amendment rights, should be subject to strict scrutiny. Only nondiscriminatory, non-content-based restrictions implicate "lesser" burdens that may be balanced under a less rigorous standard.

B. A Partisan Blanket Primary Compels Ideological Speech and Association and Manipulates Private Decision-Making Processes.

"[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment). Yet at precisely the moment in which a political party is clearing its collective throat to speak on an essential issue – whom it believes should be elected to government office – the State compels it to add discordant voices to the chorus, thus changing the definition of the collective voice and in some cases the resulting message as well. As this Court has recognized in other contexts, forcing a group "to accept members it does not desire ... may impair the ability of the original

members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623.[7] The freedom not to associate is thus an example of the more elemental First Amendment principle that the State "may not compel affirmance of a belief with which the speaker disagrees." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). And "this general rule, that the speaker has the right to tailor the speech," fully applies to "expressions of value, opinion, or *endorsement*." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (emphasis added).

Proposition 198 violates these essential prohibitions against compelled speech and association. In those primary races affected by cross-over voting, the nominee of the party may be someone opposed by the party itself but favored by adversaries of the party. Even one such occurrence constitutes a severe burden on rights of association and can cause enormous damage to the public image of the party.[8]

The court below acknowledged that "there will be particular elections in which there will be a substantial amount of cross-over voting," that there "will be a small number of elections in which the cross-over vote proves decisive, and

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[7] Unlike race or sex, party affiliation involves self-definition of ideology or lack thereof, and cannot be treated as merely a basis of impermissible stereotyping.

[8] On a practical level, a party's nominees are its most important spokesmen in the eyes of the media and the public, and one nominee can enhance or destroy the reputation of the party. Just as one disastrous use of a trade name can ruin a corporation, one disastrous use of a party name can undermine the entire party. If, for example, cross-over voting results in the nomination of a racist, all other nominees of that party suffer. *Cf. Eu*, 489 U.S. at 217 n. 4 ("Democratic Party's nomination of a "Grand Dragon of the Ku Klux Klan [who] held views antithetical to those of the Democratic Party."). Just as a corporation has the general right to prevent misuse of its name by its adversaries, the First Amendment protects a political party from disingenuous selection of its spokesmen.

there will be other elections in which the possible importance of the cross-over vote will be an influence on the conduct of the primary campaign and the conduct of elected officials" 984 F. Supp. at 1298; *see also id.* at 1299 ("[I]t is likely that in the fullness of time some California primary races will be decided by cross-over voters, even if the number of such occasions is not large."). Whether the cross-over voters are sincere, strategic, or malicious has little to do with the constitutional burden. What right do Democrats have to insist, sincerely or otherwise, that the Republicans nominate more liberal candidates for public office?[9] "[T]the choice of a speaker not to propound a particular point of view ... is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 574-75.

The party "nominees" resulting from California's primary will be perceived as the candidates endorsed by the parties whether or not the primary victories were attributable to non-party voting. The parties could thus be compelled to give seeming endorsements with which they disagreed. The parties then "may be forced either to appear to agree with [the compelled speech] or to respond." *Pacific Gas and Electric*

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[9] The court equated sincere voting with "benevolent" voting, though that normative label is rather inaccurate. At best the term harks back to the somewhat oxymoronic concept of benevolent dictatorship. The court also acknowledged that cross-over voting would occur where one party's nominee was likely to win the subsequent general election. 984 F. Supp. at 1299. Voters from the party in the minority who cross over to influence the nominees of the majority party are always insincere given that they will still vote for their own party's candidate in the general election. That the cross-over votes were for the voters' *second*-choice candidate does not soften the objection if it denies the majority party the ability to nominate *its* first-choice candidate. Furthermore, while the court below discounted the practical *impact* of "raiding" – crossing over to maliciously vote for a person thought to be the weaker opponent for the general election – the evidence it cited establishes that such behavior will nonetheless occur under a blanket partisan primary. *See* 984 F. Supp. at 1297 (citing evidence suggesting that 5-10% of cross-over voters do so maliciously).

Co. v. *Public Utilities Comm'n of California*, 475 U.S. 1, 15 (1986) (plurality opinion) (citation omitted).

The court below discounted the severity of the First Amendment burden by arguing that a "party may still endorse a candidate and may throw financial support to a particular candidate." 984 F. Supp. at 1300. But in any instance where Proposition 198 achieves its intended effect – causing nomination of someone more "moderate" than the party itself would select – this is of little comfort. A party saddled with a "nominee" it does not endorse, but who nonetheless will carry the party flag into the election, would then face the burden of having to disavow its compelled nominee in order to express its true views. As with the parade in *Hurley*, "there is no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected" nominees. 515 U.S. at 576. And, as the plurality in *PG&E* noted, if "the government [were] freely able to compel ... speakers to propound political messages with which they disagree, ... protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." 475 U.S. at 16.[10]

The relevant criteria for measuring the constitutional burden of cross-over voting are not its motive, nor how often it will occur or change the result, but whether it will *ever* occur or *ever* change the result. Even one instance of cross-over voting in a partisan primary forces a party to associate with those whom they would exclude on purely ideological bases. And even one instance of altering the result of a nomination

[10] Furthermore, given California's "sore loser" statute, § 8003, a party's true choice will then be excluded from the general election ballot entirely – regardless of whether his support exceeded that of other candidates included on the general election ballot – all because he came in second to a person with fewer votes within the party but with more votes among people not even members of the party. Indeed, a candidate could have the second-highest vote-count of *any* candidate in the primary yet still be excluded from the general election ballot.

process – or just the margin between contenders – alters the collective voice of the group. The burden is "severe" every time. And given that the alleged benefits from Proposition 198 *only* occur where there is crossing over and where the result is affected thereby, it does not matter how frequently crossing over occurs. Under California law, the claimed benefits are pegged to the very behavior – crossing over with an impact on results – that is itself burdensome. 984 F. Supp. at 1297 ("[D]efendants can hardly dispute [that cross-over voting will be more prevalent after Proposition 198] while maintaining that the State's interests are furthered by a blanket primary precisely because it facilitates cross-over voting."). At a minimum, both sides of the constitutional equation rise and fall together in the same proportion whether crossing over occurs rarely or often.[11]

Furthermore, many burdens occur even when there are no benefits. In terms of the effects on parties with electable nominees, the benefits of Proposition 198 only occur when the result of the primary is altered, but the burdens occur with every cross-over vote. As for smaller parties whose nominees have little chance in the general election, there is no supposed benefit whatsoever, but the constitutional burdens may be especially severe. Newly emerging parties are particularly vulnerable to cross-over voting due to the small number of votes involved. Abraham Lincoln's efforts to base the newly formed Republican Party on clear principles could have been frustrated by cross-over voting by slavery sympathizers. Indeed, the selection of merely one slavery sympathizer as a Republican Party nominee could have derailed Lincoln's ability to represent the Party's position in a forceful and unequivocal manner. Yet Proposition 198 makes it easy for a

[11] Although the burdens and benefits are not *inherently* bound to each other, *see infra* at 20-22, the partisan blanket structure of California law causes them to be so bound.

vested, powerful interest to destroy any new party founded to challenge such interest. [12]

Proposition 198 not only compels speech and association, it does so on the basis of viewpoint. Proposition 198's ballot statement included the purpose of selecting "more moderate problem-solvers," as opposed to strongly principled candidates. 984 F. Supp. at 1290. Indeed, the State unashamedly claims as a virtue its effort to reduce the impact of party loyalists on the parties' nomination processes. That the restriction is supposedly multi-directional – equally burdening all viewpoints deviating from the norm – does not save it. The restriction is still viewpoint-based in terms of restricting speech according to the viewpoint it *lacks* – the centrist viewpoint – rather than according to the viewpoint it has. The choice to burden all save one viewpoint is just as much a content-based decision as is a speaker's choice to *include* all save one viewpoint. *Cf. Hurley,* 515 U.S. at 569-70 ("a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech"). [13]

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[12] While few people may cross over to a minor party in the hope of eventually electing such party's nominee, it is quite easy to envision people crossing over to defeat a particularly disfavored contender. This would be "sincere" in the sense that the cross-over voters truly *dislike* one of the options, but it is no less malicious therefor. Anyone familiar with New York politics could easily imagine cross-over voting under a partisan blanket primary if the controversial Al Sharpton sought nomination by a minor party. Some might find the effort worthwhile to keep Sharpton out of the general election regardless of whether they thought his minor-party alternative had any chance at all.

[13] The supporters of "moderate problem-solvers" should create a political party for their purpose, or make their case within the decision-making processes of existing parties. For example, voters could form the "Can't We All Just Get Along Party" and then nominate and potentially elect their own candidate. Nominees from the Can't We All Just Get Along Party, if triumphant in the political marketplace of ideas, could then govern our nation pursuant to a principle of avoiding legislative gridlock. Proposition 198, however, seems to operate on the premise that it is not the meek who shall inherit the State of California, but rather the penultimately lazy. Too apathetic to form their own political party, they still manage to get to the polls every now and again and so demand the right to co-opt the party processes of others for their own ideological use.

Finally, Proposition 198 not only burdens associational rights directly, it adds a significant level of state-sponsored corruption to the decision-making process leading to party nominations. Like cash incentives for persons to vote against their consciences, partisan blanket primaries motivate persons to vote against their consciences and against their beliefs as measured by self-declared party affiliation. Even if the incentive does not alter the behavior of some or many, the mere presence of the incentive – like a standing offer of a bribe – is corruption itself.

Given the tremendous burdens on the rights of parties and their members to be free of compelled speech and association, only a strict necessity to use Proposition 198 to further a compelling interest can even begin to justify the law. Neither necessity nor any compelling interests exist in this case.

III. The Constitutionally Burdensome Aspects of a Partisan Blanket Primary Do Not Advance a Compelling State Interest.

The court below upheld Proposition 198 based upon several supposedly "compelling" state interests. 784 F. Supp. at 1303. Such interests included: decreasing the "election of party hard-liners" and promoting the election of "more moderate problem-solvers"; avoiding "legislative gridlock"; increasing "voter participation," particularly by "disenfranchised" independents and minority party voters in safe districts; protecting "voter privacy"; and enhancing the "voters' belief in the fairness of the electoral process." 784 F. Supp. at 1290, 1301, 1303 (citation and internal quotation marks

omitted). But not a single one of these interests is dependent upon the burdensome aspects of California's partisan blanket primary. Each can be advanced as well or better by less burdensome means. Furthermore, none of the interests is compelling in this case, and some are at odds with the republican system of government envisioned by the Founders.

A. No Inherent Connection Between State Interest and Burdensome Means.

Each of the State's interests turns on providing all voters the ability to select among all available candidates in the primary, thereby making the general election choices better reflect the aggregate views of the public rather than the views of the party faithful. But providing voters with unrestricted choice in a primary has nothing to do with whether the results of their collective choosing must be imposed upon and imputed to the various political parties as their supposed nominees. The alleged benefits of Proposition 198 are all a function of ballot access, not party nomination. A primary system that provided the same voter choice, but that did not purport to speak for the parties or compel their association with particular candidates, would provide all of the benefits of Proposition 198 without the First Amendment burdens. Such a system would be a *nonpartisan* blanket primary.

That ballot access in California currently happens to be partisan, and thus a function of party nomination, does not justify burdening the nominating process. Party nomination, at its core, is nothing more than speech: it is the endorsement by an association of citizens of one of its members, and the communication of that endorsement to the general public. Because the connection between partisan nominations and ballot access is due only to state fiat, declaring a state interest on the grounds that party nominations determine ballot access is tantamount to allowing the State to manufacture its own interest at the stroke of the legislative pen. The State is in effect trying to bootstrap itself into an interest by having imposed the determinative relationship and then pretending that it is not responsible for, and not capable of undoing, the now-bothersome connection.

Thus, regardless of the strength of the state interests in this case, none of those interests is advanced by the particular aspect of state law creating the constitutional burden.

That it is wholly unnecessary to burden First Amendment rights in order to advance the State's alleged interests can be seen by a comparison between a partisan and a nonpartisan blanket primary. The only relevant differences between a partisan and a nonpartisan primary are that in the partisan variety: (1) the parties are obliged to identify as "their" nominee the top vote-getter belonging to their party, regardless of whether the person received the highest number of votes from party members; (2) one so-called "nominee" from each registered party gets on the final ballot regardless of how few total votes such a person may have garnered; and (3) the runner up vote-getters belonging to each party typically are excluded from the final ballot regardless of how many total votes they may have received and regardless of whether they received more votes than the "nominees" from other parties.

The first of these differences is the source of the First Amendment burdens described in Part II. The other two differences actually cut against California's alleged interests because under a partisan system, certain candidates reach the final ballot despite their lack of support, while other candidates are excluded from the final ballot despite their substantial popular support. A nonpartisan system thus would better advance California's alleged interests without compelling speech or association. This comparison thus demonstrates not only that the State's infringement on First Amendment rights is gratuitous, but also that the unconstitutional aspects of California's system are even counterproductive regarding the State's purported goals. There is thus no need to hijack the party endorsement process to further any interests, compelling or otherwise.

If the State does not like the candidates nominated by the parties, it is free to sever the connection between party endorsement and ballot access and come up with a neutral method for determining which candidates to permit on the ballot. While each State is certainly free to explore a variety of methods in "its own experiment in democratic government," 984 F. Supp. at 1303, it is not free to ignore the First Amendment in the course of such experiments.

While the State may prefer to use private speech and associative behavior as a proxy for the underlying interest it has in limiting ballot access to those with some minimum of support, it is not at all clear that such a preference is a constitutionally significant (or valid) interest. But once the private speech and association ceases to be a reliable or desirable proxy for the valid underlying interest in limiting ballot access to those with a demonstrated minimum of support, the State is not justified in compelling an alteration in the private speech and association to better suit its needs. Rather, it must search for a different proxy or it must pursue its underlying interest directly and through its own means. Private associations must be left free to speak and to associate on such grounds of belief as they see fit. The government may not act to alter such private speech and association merely because it finds such activities insufficiently useful to serve some other goal. "Such plenary [government] control of [private self-]governmental processes denigrates the separate sovereignty of the" People. *Alden*, -- U.S. at --, 119 S. Ct. at 2264.

B. The State's Alleged Interests Are Not Compelling.

While the State's alleged interests can be as well or better served by a nonpartisan primary, the State has *no* valid interest in altering the partisan endorsement decisions of the parties for their own sakes. There is no valid state interest in saving the parties from themselves or making their *nominees* more palatable. *Eu*, 489 U.S. at 227, 232.

The alleged interest in diminishing partisanship and extreme candidates is not only unrelated to the endorsement aspects of the partisan primary, but if it were related to those aspects, the interest would be improper. In *Hurley*, this Court addressed an analogous potential interest in "produc[ing] speakers free of the [disfavored] biases, whose expressive conduct would be at least neutral toward the particular classes," but noted that such a goal "is a decidedly fatal objective." 515 U.S. at 579. This Court went on to explain that

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

515 U.S. at 579.

Eliminating partisan strife or legislative gridlock also is not a compelling State interest. The checks and balances of our Constitution are designed to promote partisan strife and legislative gridlock in order to block single-party domination. Indeed, Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, The Federalist Papers 45 (Rossiter & Kesler eds. 1999). While California and the court below seem to think of Proposition 198 as a means of eliminating the cause of faction by placing more decisions into the hands of the more "moderate" majority of electors, this misunderstands the entire problem of faction as it concerned the Founders. Madison correctly recognized that "the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*." *Id.* at 48 (emphasis in original). The solution is not to undermine the conflicting factions and replace them with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49.

When the problem of faction is seen in its historical context, Proposition 198 does not solve the problem, it worsens it by creating a mechanism for a majority faction to oust the competing minority factions of the various parties. But the "greater security" is to be found in a "greater variety of parties, against the event of any one party being able to outnumber and oppress the rest." *Id.* at 52. Multiple competing and antagonistic parties are the very solution to the far more dangerous threat of cooperative problem solvers who will more easily act in concert to accomplish the wishes of the majority faction California now wishes to empower. Far from being compelling, therefore, California's goals are anathema to the "republican remedy for the disease[]" of factionalism. *Id.*

The weight of California's remaining goals is undermined by the contradictory aspects of a primary that is simultaneously partisan and blanket in nature. As noted above, by opting for a *partisan* blanket primary, California creates a system of conflicting tendencies and effects. While it claims to seek more representative candidates, the State actually excludes candidates who have significant voter support but came in second in their own party, and includes candidates with extremely limited voter support but who happened to win a minor party primary. While there may be good reason to favor diversity of candidates over popular support, they are not reasons that California has given for Proposition 198 and they are not reasons that can be reconciled with the populist interests that the State has given. These contradictory aspects of the California primary system thus undermine the significance of the State's alleged interests. *See Greater New Orleans Broadcasting Ass'n, Inc.* v. *United States*, -- U.S. --, --, -- S. Ct. --, -- (1999) ("[T]he federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal. ... [W]e cannot ignore Congress' unwillingness to adopt a single national policy that consis-

tently endorses either interest asserted by the Solicitor General.").[14]

Because a *partisan* blanket primary is entirely unnecessary to advance California's alleged interests, and because those interests are not compelling, they cannot justify the severe burden on First Amendment rights created by Proposition 198.

* * * * *

The various guarantees contained in the Constitution are not subject to the outcomes of some referendum or the shifting preferences of tomorrow's simple majority:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638. The Constitution's confirmation of the right to freedom of speech and association represents the People's will in the most fundamental sense; expressed in a moment of clarity and extraordinary cohesion, designed to speak for the ages, and capable of change not as a result of limited majority, but at best only through the further clarity and cohesion inherent in the amendment process. In this case, the People's will as embodied in the Constitution requires that

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[14] As for the alleged interest in voter confidence in the system, the court below cited expert testimony acknowledging that merely the "'potential for raiding under the blanket primary generates wide media attention and spawns electioneering lore.'" 984 F. Supp. at 1298 (citation omitted). Creating a system with incentives for raiding thus undercuts the State's purported interest in public perception of a fair process, regardless of whether that public's perception is accurate.

the partisan blanket primary imposed by Proposition 198 be struck down.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Ninth Circuit should be reversed.

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Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL, DR. JOHN K. WHITE, PROF. BARBARA NORRANDER, PROF. DAVID TABB, DR. GARY L. ROSE, DR. DAVID K. RYDEN, DR. RICHARD DELEON, PROF. ROBERT C. SMITH, DR. JAMES FAY, DR. RONALD WALTERS AND MR. RICHARD WINGER, IN SUPPORT OF PETITIONERS

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Davis v. Bandemer, 478 U.S. 109 (1986) 16

Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) 3

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 14

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 13

Republican Party of Conn. v. Tashjian, 770 F.2d 265 (2d Cir. 1985) 6

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) 2, 3

Williams v. Rhodes, 393 U.S. 23 (1968) 6

MISCELLANEOUS

David Adamany, *Crossover Voting and the Democratic Party's Reform Rules*, 70 Am. Pol. Sci. Rev. 536 (1976) 7

John H. Aldrich, *Why Parties?* (1995) 4, 15

Am. J. Pol. Sc. 33 (1989) 10

American Political Science Association, Committee on Political Parties, *Toward a More Responsible Two-Party System* (1951) 10

TABLE OF AUTHORITIES – Continued

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Peter Aranson and J. Ordeshook, *Spatial Strategies For Sequential Elections In Probability Models Of Collective Decision Making* (1972) 13, 14

V. Blasi, *The Checking Value in First Amendment Analysis*, 1977 Am. B. Found. Res. J. 521 13

James Burns, *The Power To Lead* (1984) 6

C. Charles, *The Origins of the American Party System* (1956) 8

Kevin Cunningham, *The Jeffersonian Republican Party*, in 1 *History of United States Political Parties* (A. Schlesinger, Jr. ed., 1973) 8

Frank Dallinger, *Nominations for Elective Office in the United States* (1897) 8

Leon Epstein, *Will American Political Parties be Privatized?*, J.L. & Pol., Winter 1989 8

John Geer, *Rules Governing Presidential Primaries*, J. Pol. 48(4) 11

Stephen Gottlieb, *Rebuilding the Right of Association: The Right To Hold A Convention As A Test Case* 11 Hofstra L. Rev. 191 (1982) 7, 8, 13

Ronald Hedlund, *Crossover Voting in a 1976 Open Presidential Primary*, 41 Pub. Opinion Q. 498 (1977-78) 7

Ronald Hedlund, et al., *Voting in an Open Primary*, 10 Am. Pol. Q. 197 (1982) 7

Xandra Kayden and Eddie Mahe, *The Party Goes On* (1985) 12

V. O. Key, *American State Politics* (1956) 9, 13

TABLE OF AUTHORITIES – Continued

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V.O. Key, Jr., *Politics, Parties, and Pressure Groups* (1942) 18

Jeane Kirkpatrick, *Dismantling the Parties* (1978) 7

James Madison, *The Federalist*, No. 10 .....4, 9

N. Nie et al., *The Changing American Voter* (enlarged ed. 1979) 7

Barbara Norrander, *Explaining Cross-State Variation In Independent Identification*, Am. J. Pol. Sc. 33 (1989) 10

Nelson Polsby, *Consequences of Party Reform* (1983) 6

Gerald Pomper, *The Contribution of Political Parties to American Democracy*, in *Party Renewal In America* (1980) 7

Austin Ranney, *Turnout and Representation in Presidential Primary Elections*, 66 Am. Pol. Sci. Rev. 21 (1972) 7

Clinton Rossiter, *Parties and Politics in America* (1960) 4

A. Scalia, Commonsense, Volume 4, Number 2, *Conference on the Parties and the Nominating Process, Legal Framework for Reform* (1982) 2

E. E. Schattschneider, *Party Government* (1940) 19

E. E. Schattschneider, *Party Government* (1942) 6

John White and Jerome Mileur, *Challengers To Party Government* (1992) 18

John White and Daniel Shea, *New Party Politics: From Jefferson and Hamilton to the Information Age* (1998) 12

C. Wood, *The Creation of The American Republic, 1776-1787* (1979) 10

INTERESTS OF AMICI CURIAE[1]

The Northern California Committee for Party Renewal is a voluntary, bipartisan association of political scientists and practitioners committed to strengthening political parties in the United States. Since its inception in 1975, the Committee has worked towards revitalizing and rebuilding political parties. This effort is founded in the belief that political parties are essential to unity and give coherence to the American political system, and to maintain an effective democracy. As part of its goal, the Committee has urged that minor political parties, as well as the two major parties, be able to compete freely in U.S. elections.

Dr. John K. White is a professor of political science at the Catholic University of America, Washington, DC and co-author of *New Party Politics: From Hamilton and Jefferson to the Information Age*; Barbara Norrander is a professor of political science at the University of Arizona; David Tabb is a professor of political science at San Francisco State University; Dr. Gary L. Rose is a professor of political science at Sacred Heart University; David K. Ryden, Ph.D., J.D., is an assistant professor of political science at Hope College; Dr. Richard Deleon is a professor of political science at San Francisco State University; Robert C. Smith is a professor of political science at

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[1] All parties in this matter have consented to the filing of this Amicus Curiae Brief, as evidenced by letters of consent lodged with the Clerk. This brief was not authored, in whole or in part, by any counsel for a party. No person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

San Francisco State University; James Fay, Ph.D., is an attorney and a former professor of political science at California State University at Hayward; Dr. Ronald Walters is a Distinguished Leadership Scholar, Director, African American Leadership Institute, and professor of government and politics at the University of Maryland College Park, and Mr. Richard Winger, editor of Ballot Access News.

These political scientists believe that political parties play a vital role in maintaining a strong, effective representative democracy in our country.

SUMMARY OF ARGUMENT

The Amici professors share the views of then Professor Antonin Scalia that as "an original matter" we can " . . . see no reason why the government should be any more able to tell the Republican Party how to choose its leaders than to tell the Mormon Church how to select its elders."[2]

This is not now an original matter. Supreme Court precedent requires that the California blanket primary be invalidated by this Court. This Court concluded that Connecticut's enforcement of a state-mandated closed primary system burdened the First Amendment rights of the Connecticut Republican Party.[3] The Amici cannot understand how this Court could now conclude, consistent

[2] A. Scalia, Commonsense, Volume 4, Number 2, *Conference on the Parties and the Nominating Process, Legal Framework for Reform* (1982).

[3] *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

with that decision, that California's enforcement of its blanket open primary system does not similarly burden the First Amendment rights of the California Democratic and Republican Parties.

In fact, a mandated blanket open primary system is a greater burden on political parties' First Amendment association rights than the Connecticut mandated closed primary system.[4] Surely, it is more intrusive for the state to require political parties to include independents and members of opposing parties in a party's nomination process than requiring a party to restrict itself to its self-identified membership for nominating purposes. Additionally, the constitutionally infirmed Connecticut process did not purport to regulate part of a political party's national convention and presidential nomination process. This Court has repeatedly rejected state regulation of the presidential nominating process if, as here, it is in conflict with national political party rules.[5]

This Court should heed the advice of James Madison on the question of "factions" or "parties":

> There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence, the other, by giving to every citizen the same opinions, the same passions, and the same interests . . . It could never be more truly said than on the first remedy, that it was worse than the

[4] *Tashjian*, 479 U.S. at 234-37 (Scalia, J., Dissenting).

[5] *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975).

> disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.[6]

The essence of the First Amendment is the protection of liberty. The California blanket primary restricts the liberty of political parties in the choice of their leaders through restricting their nomination process. Just as a fire without air will expire, so too will a political party prohibited from the liberty of freely choosing its candidates. A political party unable to freely choose its leaders will cease to be a political party.

There is "no America without democracy, no democracy without politics, and no politics without parties."[7] These opening words from Clinton Rossiter's work on American political parties are as true today as when they were first written forty years ago. There is not a true democracy in the world that does not have free and active political parties. In the view of most political scientists, parties are the most important instruments for achieving effective democracy.[8] The California blanket primary severely damages the ability of political parties

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[6] *The Federalist*, No. 10 (James Madison).

[7] Clinton Rossiter, *Parties and Politics in America* (1960).

[8] *See, e.g.*, John H. Aldrich, *Why Parties?* 18 (1995).

to fulfill their important role in our representative democracy.

PLEADING

I. A Consensus Of Political Science Research And Analysis Support A Reading Of The First Amendment That Protects The Right Of Political Parties To Choose Their Own Nominating Structure.

The fundamental objectives of the First Amendment freedoms of speech, press, petition, assembly and association were to assist citizens in self government and to permit people to thwart an abuse of power by elected leaders and majority public opinion. Reading the First Amendment as permitting the state to deny political parties the right to choose who may participate in the parties' nominating processes would frustrate the purposes of the First Amendment.

The very reason a political party exists is to articulate and fight for the implementation of certain public policies. Those policies, and the principles underlying them, flow from the expressed desires of members of the political party. At the same time, a political party, the policies it espouses, and its candidates are inextricably intertwined. Candidates personify the party, and thus the selection of a candidate is one of a political party's most important functions. As E.E. Schattschneider, a foremost analyst of American political parties has said, "[t]he nominating process thus has become the crucial process of the party. The nature of the nominating procedure determines the

nature of the party: he who can make the nomination is the owner of the party."[9]

Eliminating a party's choice of its own principal leaders, its nominees, deprives it of the opportunity to shape its own political agenda and therefore to engage in the political dialogue in the most useful way. The ability to shape a political agenda is crucial to the parties' roles as collective instruments of First Amendment protected speech. *See* James Burns, *The Power To Lead* 143-45, 235 (1984) (parties serve the public by offering choices).

It is fundamental to the First Amendment that there is no fixed immutable truth – no one position that parties may be expected to expound forever. *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968); *Republican Party of Conn. v. Tashjian*, 770 F.2d 265, 284-85 (2d Cir. 1985). As circumstances change, the parties must be free to explore the political requisites of that period. *See* Nelson Polsby, *Consequences of Party Reform* 183-85 (1983). Hence any state decision that denies to parties the opportunity to make a political choice affecting the message which it espouses to the public – its nominations and platforms and all that parties stand for – impoverishes public discourse. Freedom of choice for the parties contributes to the American marketplace of ideas.

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[9] E. E. Schattschneider, *Party Government* 64 (1942).

II. Including Or Excluding Independents And Members Of Other Parties From A Party's Primary Electorate Does Make A Difference.

Independent voters do not merely duplicate the views of the party faithful. *See* David Adamany, *Crossover Voting and the Democratic Party's Reform Rules*, 70 Am. Pol. Sci. Rev. 536 (1976); Austin Ranney, *Turnout and Representation in Presidential Primary Elections*, 66 Am. Pol. Sci. Rev. 21, 33, Tables 8 and 9 (1972); Ronald Hedlund, *Crossover Voting in a 1976 Open Presidential Primary*, 41 Pub. Opinion Q. 498, 502-04 (1977-78); Ronald Hedlund, et al., *Voting in an Open Primary*, 10 Am. Pol. Q. 197 (1982). Members of the Republican Party have different political views than members of the Democratic Party. Libertarian party members have a radically different view of the role of government than Socialist Workers party members. Hence any decision permitting cross-participation affects these parties' agenda, their nominees and platforms.

Parties do more than help to make the ballot manageable. Party nominations also continue to be persuasive with a large percentage of the electorate. *See* N. Nie et al., *The Changing American Voter* 47-73 (enlarged ed. 1979). On the contributions of political parties to the political debate, *see* Gerald Pomper, *The Contribution of Political Parties to American Democracy*, in *Party Renewal In America* 5-10 (1980); Jeane Kirkpatrick, *Dismantling the Parties* 5 (1978); Stephen Gottlieb, *Rebuilding the Right of Association: The Right To Hold A Convention As A Test Case*, 11 Hofstra L. Rev. 191, 208-21 (1982).

The parties are not merely state voting machinery. Endorsements of parties and their predecessors have

been an important part of the political debate since the founding of the Republic. See Frank Dallinger, *Nominations for Elective Office in the United States*, 1-13, 21, 26 (1897); Kevin Cunningham, *The Jeffersonian Republican Party*, in 1 *History of United States Political Parties* 239, 241-42 (A. Schlesinger, Jr. ed., 1973); C. Charles, *The Origins of the American Party System* 83-84 (1956); Gottlieb, *supra*, at 194-95. More public officials are popularly elected in the United States than in any other nation. The parties provide a rational basis for voter decision-making among the myriad known, little known, or unknown individual candidates who run for office in this country. Candidates nominated by political parties represent certain views and philosophies. Although there is a wide range of differences within the major American political parties, party identification has a symbolic meaning for the electorate, and a party platform and goals provide a means of evaluating a candidate. A partyless or party diluted nominating process debases this identification role for the electorate.

A political party is not a public utility simply providing a power grid for candidates' messages. Parties shape the message, and for a state to control any party's central function of nominating is for that state to control the message.[10]

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[10] *See* Leon Epstein, *Will American Political Parties be Privatized?*, J.L. & Pol., Winter 1989.

III. The Appropriate Structure For A Party's Nominating Process Is A Complex Political Decision Dependent On Variables of Time, Place, Political History And Goals.

The nominating structure mandated by California law and the different structure required by the Democratic and Republican Party rules may each be argued to be valid solutions responding to difficult political questions. There is a time and place for different strategies regarding who should vote in a primary and therefore how the party's political agenda will be shaped. For the parties to play a role in vigorous political debate, they must be free to define their own political agendas.

If the parties perceive a public need to make clearer ideological choices, or a public distaste for the similarity in posture that the major political parties sometimes take, then a closed primary may prove preferable. See V. O. Key, *American State Politics*, 165-96 (1956). One may seek to restrict primary voting to the party faithful in order to sharpen the political debate at a time when the similarity of the two parties prevents the public from taking control at the polls. Without that control at the polls, the public cannot effectively penalize officeholders who fail to live up to their trust, or effectively exercise the right of self-government.

The Framers of the First Amendment, though ordinarily portrayed as fearing "faction", also recognized the importance of cohesive types of political organization for the health of the body politic. See J. Madison, *The Federalist*, No. 10. Although the Framers did not discuss the terms in any detail, they recognized organizations and

forms of representation which were "close to the people" as necessary building blocks of political organization. C. Wood, *The Creation of The American Republic, 1776-1787* 319-28 (1979) (describing the power and ubiquity of popular resort to non-government associations, so-called "factions", that form an honored part of the history of the rights of speech, assembly and association); *Id.* at 189-96 (describing the importance on the eighteenth century mind of delegates' actual representation of the perceived interests of their areas).

The present Republican and Democratic Party rules facilitate that type of policy choice by defining and narrowing the base of political support attracted by the parties. A more narrowly defined portion of the electorate is more able to reach agreement on policies, which can in turn be stated more concretely for the "adherents". A nomination based on that kind of primary contest will tend to present a clearer picture to the general electorate than one emerging from a more broadly based primary. By clarifying positions, this approach serves the process of public discussion protected by the First Amendment and allows the public greater control over the policies pursued by the government, certainly one of the objects of the First Amendment. *See* American Political Science Association, Committee on Political Parties, *Toward a More Responsible Two-Party System* (1951) (for the classic statement of this view). States with closed primaries have fewer independents and more partisans than states with other types of primary laws.[11] It is certainly reasonable to

[11] Barbara Norrander, *Explaining Cross-State Variation In Independent Identification*, Am. J. Pol. Sc. 33 (1989), pp. 516-36.

argue that it is in the best interest of political parties to maintain a larger group of citizens who identify with that party than to encourage political independence.

Political reality is quite complex, and whether these are advantages may depend on one's political goals. Closed primaries can result in major swings between political extremes or a long period of one party dominance, but these implications are not always realized. In general, the closed and open blanket primary models represent a classic confrontation between stability and change, between a primary system driven by cohesive minorities and one driven by broader coalitions. In a time when the public needs "a choice, not an echo", then a narrow definition of the eligible primary voters may prove appropriate. In a time when the public needs an opportunity to pull together, to achieve a broad definition of their common ground, to accomplish common objectives or to vote out the "bad guys", then a broad definition of primary voters may prove appropriate.[12]

These are political questions, not regarding separation of powers as the term is often used by this Court,[13] but are political questions in the sense in which the core of the First Amendment protects the independence of "political answering." In requiring that the parties accept its definition of the primary electorate, the State of California denies the Republican and the Democratic parties a

[12] John Geer, *Rules Governing Presidential Primaries*, J. Pol. 48(4) pp. 1006-25.

[13] See *Baker v. Carr*, 369 U.S. 186 (1962).

tool to accomplish the First Amendment objective of competitive, participatory politics. The public cannot have the benefits of a party choice if through state action a party is required to accept a model the party rejects.

This is of special relevance in the case of minor political parties. Individuals frequently join a minor political party because they support the specific ideology of that party and because they are not satisfied with the Republican or Democratic Party's position on a specific issue. Most members of minor political parties do not expect their candidates to win office, but do expect them to reflect the party's platform position and to articulate on those issues, simulating their membership. The California blanket party system permits people with no interest in the party's specific issues to participate in a minor party's nominating process. Since a minor political party has a comparatively small number of registrants, it takes few non-members to distort its nominating process. American history is littered with minor parties that advance new ideas, only to have those ideas adopted by the major parties. Neither the Whig nor the Democratic parties opposed slavery, but the new Republican Party did; neither Democrats nor Republicans favored the direction of the election of senators, but the Populists did. A minor political party's ability to restrict its electorates to ideological supporters is vital to its continued existence and its historical role of a source of political change.[14]

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[14] John White and Daniel Shea, *New Party Politics: From Jefferson and Hamilton to the Information Age* 264-299 (1998). Xandra Kayden and Eddie Mahe, *The Party Goes On* 143-145 (1985).

The First Amendment was, and is, intended to permit the public to govern itself by conducting a critical examination of all choices of policy and personnel affected by the election process. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *See also* V. Blasi, *The Checking Value in First Amendment Analysis*, 1977 Am. B. Found. Res. J. 521, 523-67. Rather than encouraging a marketplace of ideas, restriction on party organization restricts the consideration and ultimate presentation of points of view embedded in a party's nominations, platform and campaign. Candidates must consider the relevant electorate in designing their positions and appeals. Thus differently constructed parties are likely to call for different arguments. See Peter Aranson and J. Ordeshook, *Spatial Strategies For Sequential Elections in Probability Models of Collective Decision Making* (1972). Moreover, as different party electorates would make different choices, the party would come to stand and argue for different political solutions to public problems. *See* V. O. Key, *American State Politics* 165-96 (1956). Hence restricting a mechanism of party decision-making results in restricting the form of political expression based thereon.

The First Amendment must be read to protect effective political speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964). The right of assembly was provided not merely to satisfy the desire of people to gather in a public square, but because it was through the organization of the public that the people could work its will on its representatives. *See* Gottlieb, *supra* at 194-96. The scope of the right of association as a derivative of the

speech, assembly and petition clauses must be understood to accomplish the objective of assisting the public in its political chores. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

It makes a considerable difference whether a party is able to communicate with its membership and its intended audience and determine a common choice or merely guess at the results. If it cannot communicate with its intended audience in order to incorporate their preferences, but must nominate on the basis of some other audience, then the results of that nomination process will be skewed in the direction of other groups included within the state-mandated franchise. Thus the way the party is defined will prove crucial. *See* Aranson and Ordeshook, *supra*. If the government of California can define the party, it will be able to limit the way the party can serve the public.

Because the structure of political association is intimately related to its message, California statutory choice among types of association restricts the parties' messages and thus strikes at the heart of free speech, assembly and association. The issue is not whether an open blanket primary is "better" than a closed primary, but whether a political party or the state has the right to make that decision.

There is an important value in recognizing the right of the parties to make their own choices. They will be rewarded for offering the public that approach which will make them most competitive. They will be penalized for any approach that costs them political and electoral support.

IV. Political Parties Play A Unique And Crucial Role In Our Democratic System Of Government, Which Is Damaged By The Mandated California Blanket Primary.

Parties enable citizens to participate coherently in a complex system of government, allowing for a substantial number of popularly elected offices. They bring fractured and diverse groups together as a unified force, provide a necessary link between the distinct branches and levels of government, and provide continuity that lasts beyond terms of office. Parties also play important roles in encouraging active participation in politics[15], holding politicians accountable for their actions, and encouraging debate and discussion of important issues.

Political parties, as we know them, are an American invention. Parties were not accidents of history. Our earliest political leaders realized that they were essential in bringing order to America's tripartite form of government. Thomas Jefferson and James Madison devised them as means of changing the policy directions of government. *See* John H. Aldrich, *Why Parties?* at 68-95. Later, Andrew Jackson and Martin Van Buren revised them as means of expanding popular participation in government. *Id.* at 97-156. Since the earliest days of our Republic, they have, albeit imperfectly, continued to serve these

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[15] According to a 1992 study conducted by the National Opinion Research Center and the American National Election Survey (unpublished), persons who were affiliated with the Democratic and Republican Party were more likely to have voted, to be interested in, pay attention to, or care about the results of, the presidential election, than persons unaffiliated with a political party, by significant margins.

ends. Parties are the only broad-based, multi-interested organizations in this country that can recruit candidates for office, mobilize popular support behind them, and organize those elected into a government. Unlike special-interest groups, parties must appeal to majorities in the electorate if they are to win, and unlike single-candidate organizations, they must win many races if they are to govern. Parties, moreover, give a coherence to American politics. We have a constitutional system and a political culture dominated by disunifying forces – separated powers, federalism, pluralism and individualism. Parties have been a unifying force in this system, cutting across the branches and levels of government as well as across voting blocks to aggregate interests, build coalitions and make mass democracy possible.[16]

Individual candidate organizations do not provide the men and women they support with programs or principles. Single issue groups lead to fragmented government, the neglect of broader policy needs, and the neglect of needs of citizens not represented by groups. Political parties, on the other hand, can compromise and incorporate the wishes of a wide range of citizens in programs that encompass a multitude of issues and stretch across a greater time span than a term of office.

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[16] "There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change." *Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring).

They can marshal the resources and develop the strategy to recruit, train, support and guide a succession of highly qualified individuals to advance those programs during their terms in office. Political parties provide an effective means of holding elected representatives accountable to the people who elect them on the basis of their parties' programs. They are able to put forward a broad panel of spokespersons in defense of their programs, informing and educating the citizenry in a debate that extends well beyond the short-range electoral prospects of particular candidates.

Only political parties can provide us with the cohesion, continuity and accountability necessary to make democracy work. Political parties are the only broad-based, popular intermediaries between the people and their government. Voters use them to steer government in directions they wish it to go. When political parties work, government works. When they do not, government falters and drifts. Yet, the California system minimizes the importance of our party system, rendering partisan identification procedurally meaningless in nominating.

Political parties, as they evolved in this country, have greater importance than in other Western democracies for a myriad of reasons. In all democratic nations, political parties have the purpose of controlling and directing the struggle for political power. Political parties in the United States do this, but are also unique in that they provide a framework for the accommodation and consensus development which our political system requires function. The party system, when it operates properly, overcomes the handicaps to governance imposed by the separation of powers and furnishes a common leadership and a bond

of loyalty through which a governor and legislative leaders or the President and Congress work.[17] These bonds are weakened when it is no longer clear that these elected "party" nominees share even the same primary electoral base. The blanket primary disconnects candidates from core party interests and groups to the detriment not only of traditional party structures but of our representative government.

When candidates and parties are interdependent, political responsibility is enhanced. When candidates are not dependent on parties for funds and material support, holding elected officials accountable becomes more difficult. The more a candidate depends on the party, the greater the party's ability to apply its leverage to achieve policy coherence and mobilize party majorities in Congress or a state legislature. Since it is easier to get groups to agree than contentious, independent individuals, national unity and consensus are more attainable when parties are strong.[18]

CONCLUSION

"Without parties there can be no organized and coherent politics. When politics lack coherence, there cannot be accountable democracy. Parties are indispensable to the realization of democracy. The stakes are no less than that . . . Modern democracy is unthinkable save in

[17] V.O. Key, Jr., *Politics, Parties, and Pressure Groups* (1942).

[18] See generally, John White and Jerome Mileur, *Challengers To Party Government* (1992).

terms of parties."[19] These assertions represent the overwhelming consensus of those who study American Politics. If we understand the essential role of healthy parties in our political system, then, at the very least, one of the goals in governmental regulation of our electoral system should be preserving the vitality and health of our political parties. The California mandated blanket primary significantly impairs the long-term health of our political parties. The decision as to what options are best to maintain the important, vital functions of our political parties must rest with the parties themselves. The power to define includes the power to destroy. If a political party is to fail, it must not be as a consequence of a choice mandated by the state.

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[19] E. E. Schattschneider, *Party Government* 1 (1940).

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IN THE

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, ET AL.,
Petitioners,

vs.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AND THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

Amicus Curiae Republican National Committee ("RNC") is the national political organization and governing body of the Republican Party of the United States.[1] *Amicus Curiae* Democratic National Committee ("DNC") is the national political organization and governing body of the Democratic Party of the United States. The RNC and DNC are filing this joint brief on behalf of their respective parties because they both strongly believe in the right of the Republican and Democratic parties to organize and operate in the way they believe best serves their respective beliefs and interests.

The RNC and DNC believe that California's Proposition 198 unconstitutionally interferes with the ability of party organizations to determine who will participate in the selection of the parties' nominees for public office and how the internal affairs of the parties will be structured. The RNC and DNC both provide a valuable perspective on this issue because they can address the severe impact of Proposition 198 not only on the state and local Republican and Democratic parties, but also on the two parties' national nominating conventions.

Strong party organizations bolster our democracy, and each party will be strengthened and will function most effectively if the selection of the parties' nominees for

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

elected office is limited to voters who qualify under party rules. California's Proposition 198, the "Open Primary Act," precludes the parties from limiting the selection of nominees in this way in California, and therefore impairs the ability of the party organizations to operate in the manner that they have decided best serves their interests.

In particular, Proposition 198 directly conflicts with the rules of the RNC and DNC for selection of delegates to their national presidential nominating conventions. Although the rules of the RNC and DNC differ in a number of respects, both sets of rules require that the delegation to the convention from each state reflect the preference of party adherents in that state as to whom should be the party's nominee for President of the United States. Proposition 198 prevents the parties from implementing that rule with respect to the California presidential preference primary, because Proposition 198 permits all voters, regardless of registration, to choose between all candidates for president running in all of the various political parties, on a single ballot.

Further, the national convention of each party serves as the highest governing authority of that party, with power to adopt and amend the party's internal governing structure, principles and rules. In a manner contrary to party rules, Proposition 198 permits voters from other parties to select delegates from California who are empowered to act on these fundamental matters of internal governance of each party. Such a result would seriously undermine the Republican and Democratic parties' ability to organize and operate in the way they believe best serves their respective interests.

Because of the conflict between Proposition 198 and the DNC and RNC rules, the California legislature enacted a law requiring the Secretary of State to report the number of

votes cast for each candidate in the presidential preference primary by all voters, and separately to report the number of votes each candidate received from voters registered with each party. Cal. Elections Code § 15375(c)(1999), as amended by California Senate Bill 100, section 2 (1999). Under this system, the California Democratic Party will be provided with an official tally of the number of votes cast for each Democratic presidential candidate by registered Democratic voters, and the California Republican Party will be provided with an official tally of the number of votes cast for each Republican presidential candidate by registered Republican voters. This tally will then be used by each party to allocate delegate positions among its respective presidential candidates.

Thus, on March 7, 2000, there will effectively be two elections held at the same time, on the same ballot: the blanket primary mandated by Proposition 198, the results of which will have no meaning or effect with respect to the allocation of delegates, and the actual vote of registered Democrats for Democratic presidential candidates and registered Republicans for Republican presidential candidates, which will be used to allocate delegate positions for each party's national convention.

STATEMENT OF THE CASE

I. REPUBLICAN NATIONAL COMMITTEE

The Republican National Committee ("RNC") is an unincorporated association created and governed by the Rules of the Republican Party ("Republican Party Rules"). The RNC, comprised of an elected national committeeman, national committeewoman, and state party chair from each state and territory, is the governing body of the Republican Party at the national level, subject to direction from the delegates who convene during the quadrennial national convention. The RNC is involved in getting Republicans elected to public office across the United States at the federal, state and local level, and in promoting the Republican philosophy to the American electorate.

It is important to note the critical functions performed by the Republican National Convention. In addition to nominating the Republican candidates for President and Vice President of the United States, the national convention promulgates the Republican Party Rules and the platform of the national party, which sets forth the guiding principles of the Republican party. The national convention is the only body with the authority to adopt and amend the Republican Party Rules and party platform. The RNC must operate under the Republican Party Rules, as adopted, for the following four years until the next national convention. Therefore, delegates to the national convention are the ultimate arbiters of the Republican party's internal affairs.

A. Delegate Selection Procedures Under Republican Party Rules.

Republican Party Rule 32 governs the selection of delegates to the Republican National Convention. Under this Rule, state law has precedence over state party rules with respect to the establishment of the selection process. *Id.* at 32(a). Each state, and each state Republican party if state party rules govern the selection process under state law, is permitted to determine the method of selecting its delegates. These methods traditionally include direct primaries, conventions and caucuses, or a combination of both.

Participation in these processes shall in no way be abridged for reasons of sex, race, religion, color, age, or national origin. Furthermore, the RNC and state parties are encouraged under Republican Party Rules to achieve the broadest possible participation by men and women, young people, minorities, heritage groups, senior citizens, and all other citizens in the delegate selection process. Republican Party Rule 34(b).

Under Republican Party Rules, states and state parties were permitted to make material changes to their delegate selection procedures up until July 1, 1999. The California Republican Party certified that its delegate selection procedures for the 2000 national convention would be governed by a combination of state law and state party rules. Under California law, there will be a separate tabulation of votes cast by registered Republican voters for Republican presidential candidates at the March 7 presidential primary. Cal. Elections Code § 15151(a)(3). Those Republican results are then used by the California Republican Party when it convenes the District Conventions and State Convention to

select delegates and alternates to the national convention. California Republican Party Bylaws §§ 6.02 – 6.06.

B. Prohibition on Blanket Primaries.

Rule 32(b)(9) prohibits the selection of delegates to the Republican National Convention through blanket primaries. If state law provides for the selection of national convention delegates by blanket primary, then such delegates must be elected by state party-run congressional district or state conventions as outlined in Rule 32(c). *Id.*

The Republican Party Rules also prohibit blanket primary elections for the selection of Republican nominees. Specifically, Rule 34(f) prohibits the recognition of any state party rule or state law that provides for blanket primary elections. No person nominated under such a regime can be recognized by the RNC as the nominee of the Republican Party. *Id.* If a state selects nominees by blanket primary, the Republican nominee must be selected by a state party-run convention process as specified in Rule 32(c), unless a state party rule provides specifically to the contrary. *Id.*

Rule 32(c) delineates the convention selection process under the Republican Party Rules. If a convention method is used, only voters deemed to be Republicans may participate in the selection of nominees or delegates to the national convention.

II. DEMOCRATIC NATIONAL COMMITTEE

Under the Charter of the Democratic Party of the United States ("Charter"), the Democratic Party is required to assemble in a national convention each year in which an election for the office of President of the United States is to be held. Charter, Article Two, § 1. The National Convention is the "highest authority of the Democratic Party," with power to recognize state party committees as official organizations of the Democratic Party, nominate candidates for the offices of President and Vice President of the U.S., adopt a platform and act on such other matters as it deems appropriate, *Id.*, Article Two, § 2, which may include amendments to the party's Charter and Bylaws. *Id.*, Article Ten, § 1.

The Democratic National Committee ("DNC") has general responsibility for the affairs of the Democratic Party between conventions. *Id.*, Article Three, § 1. The DNC, founded 150 years ago, is an unincorporated association consisting of the national officers of the DNC, the chair and highest ranking officer of the opposite sex of each state party organization, 200 additional members apportioned to the states on the basis of population and Democratic voting strength, representatives of certain party organizations, and 75 at-large members elected by the remaining members. *Id.*, Article Three, § 2. The total membership of the DNC now stands at 446.

A. The Presidential Nominating Process Under DNC Rules.

The selection of delegates to each Democratic National Convention is governed by Delegate Selection Rules, which are adopted by the full DNC and have the

status of party bylaws. The selection of delegates to the 2000 Democratic National Convention is governed by the 2000 Delegate Selection Rules, which were adopted by the DNC at a meeting held in Washington, D.C. on May 9, 1998.

The rules for selecting delegates, administered by the DNC, impose several basic requirements on the state parties:

- The nominating process must be fair, open and free from discrimination based on race, religion, national origin, or gender (Delegate Selection Rules for the 2000 Democratic National Convention, Rules 4 and 5).
- Delegations from each state must largely consist of delegates pledged to a particular presidential candidate, and these pledged delegate positions must be allocated proportionately based on the results of a primary or caucus in which all Democratic voters -- but only Democratic voters - can participate. *Id.* Rules 2A-C; Rule 12.
- The selection of persons to fill these pledged positions must be made through a fair and open process in which supporters of each presidential candidate can choose the delegates to represent that candidate at the Convention *Id.* Rule 11.
- The timing of the first stage of delegate selection (primary or first-tier caucus) is limited, with Iowa and New Hampshire being allowed to hold their events first, Maine next, and all other state parties being forbidden from holding binding nominating events prior to the first Tuesday in March. *Id.* Rule 10A.

Those voting in the California presidential primary effectively choose the presidential candidate to whom delegates to the 2000 Democratic National Convention will be pledged. Delegate positions are allocated in proportion to the percentage of the vote won by each presidential

candidate. In 2000, the presidential preference primary will be held on March 7, 2000.

On January 23, 2000, the California Democratic Party held congressional district meetings, or caucuses, open only to registered Democrats, to choose a slate of persons committed to each candidate. California Delegate Selection Plan for the 2000 Democratic National Convention. For example, if five district-level delegates to the national convention are to be chosen from a particular congressional district, and there are two presidential candidates, X and Y, five persons were slated for each candidate at the January 23 caucuses.

If candidate X then wins 40% of the vote in the presidential primary on March 7, candidate X will be awarded 40% of the five district-level delegate positions, or two district-level delegate positions. The top two vote-getters slated in the January 23 caucuses will be assigned those positions, and will thus be credentialed to attend the 2000 Democratic National Convention as district-level delegates pledged to presidential candidate X. *Id.* This process will be used to allocate and fill 239 district-level delegate positions from California. The results of the primary will also be used to allocate, among the Democratic presidential candidates, 48 pledged party leader and elected official delegate positions and 80 at-large delegate positions from California. *Id.*

B. Prohibition on Open and Blanket Primaries.

In devising the Delegate Selection Rules for the 1988 Democratic National Convention, a DNC commission recommended, and the DNC adopted, a rule which granted "grandfather" exemptions for two states that already used

open primaries -- Wisconsin and Montana -- but which forbade any other state Democratic Party from future use of a delegate selection process open to voters other than registered or publicly-declared Democrats. That rule, which has remained in effect for the 1992, 1996, and 2000 Conventions as well as the 1988 Convention, provides that:

2 A. Participation in the delegate selection process shall be open to all voters who wish to participate as Democrats. Implementation of this administrative matter shall be delegated to the DNC Rules and Bylaws Committee.

2 B. Nothing in these rules shall be interpreted to encourage or permit states with party registration and enrollment, or states that limit participation to Democrats only, to amend their systems to open participation to members of other parties.

Since 1980, no state Democratic Party other than those in Wisconsin and Montana has been permitted to undertake the selection of delegates through a process open to Republicans. Any delegate selection plan that provided for selection of delegates through a blanket primary like that mandated by California's Proposition 198 would be disapproved by the DNC's Rules and Bylaws Committee; any delegation from California chosen through such a process would be subject to a credentials challenge at the national convention. Delegate Selection Rules, Rule 19B.

SUMMARY OF ARGUMENT

The California Republican and Democratic parties strongly believe that participation in their party primaries should be limited to individuals qualified to vote under party rules. Consistent with this judgment, the rules of the national Republican party prohibit the seating of any delegate at the national convention who is selected by voters not eligible to vote under party rules. As explained above, the rules of the Democratic party contain similar provisions. Republican Party Rules also prohibit the RNC from recognizing and financially assisting any nominee for public office who is chosen by voters who have participated or are participating in another party's primary. These decisions by the state and national Republican and Democratic parties reflect their fundamental views about how their nominees for public office and delegates to the national convention should be selected and how their parties' internal affairs should be structured.

In the face of these collective decisions by the Republican and Democratic parties, the State of California, through Proposition 198, seeks to allow voters to cross-vote in the parties' primaries without requiring any type of voter commitment to a particular party. California's attempt to substitute its own judgment for that of the state and national parties is unquestionably a severe burden on the fundamental First Amendment associational rights of the Republican and Democratic parties.

Under binding Supreme Court precedent, any state interference with a political party's internal decision-making -- including a party's decision on who should participate in selecting its nominees for public office -- is constitutionally suspect as a matter of law. Because California has not

shown and cannot show that Proposition 198 serves any compelling state interest, it is unconstitutional. Proposition 198 fails to serve even a legitimate interest, acting only to abridge the protected will of the parties to control their own destiny, and creates a confusing and divisive conflict with the rules of the RNC and the DNC. Accordingly, this Court should reverse the Court of Appeals and declare Proposition 198 unconstitutional under the First Amendment.

ARGUMENT

I. UNDER THE FIRST AMENDMENT, POLITICAL PARTIES HAVE A FUNDAMENTAL RIGHT TO FREEDOM OF POLITICAL ASSOCIATION.

While the Constitution grants broad powers to the states to regulate the conduct of elections, these powers are not without limitation. Under Art. I, § 4, cl. 1, the states have the power to prescribe the "Times, Places and Manners of holding elections . . ." for public office. However, "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as . . . the freedom of political association." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986).

Freedom of association in the context of political parties means not only that an individual voter can associate with the political party of his or her choice, but also that political parties themselves have fundamental rights. In this regard, this Court has recognized that political parties have the right to "'identify the people who constitute the association,'" *Id.*, 479 U.S. at 214 (quoting *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981), and to select a "standard bearer who best represents the party's ideologies and preferences." *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (D.C. Cir. 1975) (Tamm, J., *concurring in result*), *cert. denied*, 424 U.S. 933 (1976).

When determining whether a state election law violates First and Fourteenth Amendment associational rights, this Court has established the following test:

Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citations omitted). When a state law interferes with a political party's internal decisions and policies about how to conduct and organize its affairs, this Court and lower courts have ruled that such a law is subject to strict scrutiny. *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Republican Party of Ark. v. Faulkner County*, 49 F.3d 1289, 1294 (8th Cir. 1995) ("the internal affairs of political parties are off-limits to state regulation, unless the state finds it necessary to meet a compelling [state] interest").[2]

As a matter of law, Proposition 198 imposes not merely a "significant" burden, but a *severe* burden on the associational rights of the political parties. In upholding the California law, the Court of Appeals' decision vitiates the ability of political parties to make the internal decision of who will participate in the selection of the party's nominee to

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[2] State election laws that regulate general election or ballot access matters do not necessarily severely burden the core First Amendment rights of political parties because they are "necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections." *Eu*, 489 U.S. at 231-32 (emphasis added). For example, in *Timmons*, a minor political party challenged the constitutionality of an antifusion law which prohibited candidates from appearing on the ballot as the candidate of more than one party. 117 S.Ct. at 1364. *See also Storer v. Brown*, 415 U.S. 724 (1974); *Burdick v. Takushi*, 504 U.S. 428 (1992). Accordingly, unlike state attempts to regulate internal party matters, state regulation of external party affairs may not trigger strict scrutiny.

elective office. Therefore, Proposition 198 is unconstitutional unless it survives strict scrutiny.

A. Under the First Amendment, Political Parties Have the Fundamental Right to Identify the Memberships of Their Associations.

"[A] State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure. . . ." *Eu*, 489 U.S. at 233. "[T]he stringency, and wisdom, of membership requirements is for the association and its members to decide -- not the courts -- so long as those requirements are otherwise constitutionally permissible." *LaFollette*, 450 U.S. at 124 n.25.[3]

Freedom of association means that a political party has the right to "identify the people who constitute the association . . . and to select a standard bearer who best represents the party's ideologies and preferences." *Eu*, 489

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[3] It is important to distinguish the issues involved in the present case from those involved in *Lightfoot v. Eu*. 964 F.2d 865 (9th Cir. 1992). In *Lightfoot*, the Ninth Circuit upheld a California law that requires political parties to nominate their candidates by direct primary, even if it violates party rules. Determining which nominating system to use is analytically distinct from the constitutional right of political parties to define their associations. The nominating system issue goes to how a party selects its nominees for inclusion on the general election ballot. *See id.* at 872 (citing *American Party of Tex. v. White*, 415 U.S. 767 (1974)). By contrast, Proposition 198 seeks to dictate who may participate in a party's nomination process. Insofar as *Lightfoot* involved the issue of who may elect nominees, California conducted closed primaries at the time which merely expanded the universe of eligible voters from nominating convention participants to registered party members. Therefore, Proposition 198 is analytically distinct from the law at issue in *Lightfoot*.

U.S. at 224 (internal quotations and citations omitted). This freedom includes the right to determine the boundaries of the association and the structure which best allows the party to pursue its political goals. *Tashjian*, 479 U.S. at 224. To this end, the courts have invested political parties with wide discretion to structure their internal governance and activities. *Republican Party of Ark.*, 49 F.3d at 1294.

Moreover, the courts have recognized that the inclusion of unaffiliated voters may distort the collective decisions a political party makes during primary elections. *See LaFollette*, 450 U.S. at 122 ("On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions -- thus impairing the party's essential functions -- and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles'") (citations omitted). Accordingly, a state "may enact laws to prevent the disruption of political parties from without, but not . . . laws to prevent the parties from taking internal steps affecting their own process for the selection of candidates." *Eu*, 489 U.S. at 227 (emphasis added).

Consistent with these principles, this Court has protected the core associational right of political parties to identify the boundaries and memberships of their associations. In *Tashjian*, for example, the Court ruled that a Connecticut statute providing for a closed Republican primary -- one in which only registered Republicans could participate -- was unconstitutional where the state's Republican Party had adopted a rule opening the primary to registered independents, i.e., voters not registered with either major party. The Court's holding was not based on the unique burdens placed by a closed primary on the party's associational rights. Rather, it was based on the broad

principle that a state law that dictates who may participate in a party's nominating process over the objection of the party severely burdens the rights of that party and its adherents. *Tashjian*, 479 U.S. at 214, 215-16.

Proposition 198 prevents political parties from associating with whomever they choose at "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 216. The California Republican and Democratic parties and the national parties have determined that only qualified voters under party rules should participate in their nomination processes. The RNC and DNC believe that participation in a nomination process, whether by direct primary, convention, or another permitted method, should be limited to voters who are willing to participate in only one party's primary.

Limiting participation in the nominating process in such a manner does not enhance intraparty factionalism or make candidates more beholden to one internal constituency over another. Rather, it provides competing forces within the party an opportunity to engage in an internal conversation with party members so that the members can achieve a resolution in anticipation of the general election. "A primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them." *Eu*, 489 U.S. at 227. In sum, the political parties merely want to exercise their core First Amendment rights by settling internal differences within the party itself, free from intrusion by voters who are unwilling to commit to just one party's primary.

If the political parties want to invite unaffiliated voters to participate in the resolution of internal matters, that is a choice for the *parties* to make, not the state. *See*

LaFollette, 450 U.S. at 122 n. 22 ("'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'") (quoting L. Tribe, *American Constitutional Law* at 791 (1978)).

Consistent with this reasoning, the RNC has promulgated rules that prohibit blanket primaries. In particular, RNC Rule 34(f) prohibits the RNC from observing any state party rule or state law that provides for blanket primaries. The RNC cannot recognize any person nominated in violation of that Rule as the nominee of the Republican party for any federal, state or local office. *Id.* This rule further provides that if there is a violation of the Rule, the Republican nominees must be selected by a convention process, unless a state party rule provides specifically to the contrary. *Id.* Such conventions allow only Republican voters to participate in the selection of the nominees. *Id.* at 32(c). Accordingly, from the perspective of the RNC, it is possible for California to have two sets of outcomes as a result of a blanket primary election: one the result of the blanket primary and the other the result of the state party's Republican nominating convention. From the perspective of the DNC, under California law, the blanket primary nominee for an office other than President is granted automatic access to the general election ballot, even though such nominee may not be the choice of Democratic voters.

Proposition 198 severely burdens the rights of the RNC because the nominee recognized under its rules may not be the one nominated by the state's blanket primary. For a federal, state or local office other than President, the blanket primary nominee will be designated on the general election ballot as the nominee of the party, despite the fact

that the party, under its rules, may have nominated another candidate. Under that scenario, the actual nominee of the party would not be included on the general election ballot. Therefore, Proposition 198 severely burdens political parties because they may have to choose between the candidate with access to the general election ballot and the actual nominee of the party. This "choice" creates a severe and unconstitutional burden on the associational rights of the parties.

B. Interfering with the Parties' Ability to Determine the Makeup of a Delegation to the Parties' National Nominating Conventions Imposes a Particularly Severe Burden on the Parties' Rights of Association.

The associational rights of the parties are especially strong in the context of selection of delegates to their national nominating conventions. The RNC Rules have a prohibition on blanket primaries in this context as well. *See* RNC Rule 32(b)(9). "The right of members of a political party to gather in a national political convention in order to formulate proposed programs and nominate candidates for public office is at the heart of the freedom of assembly and association. . . ." *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring). "A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution." *LaFollette*, 450 U.S. at 124. "The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice Presidential candidates." *Cousins*, 419 U.S. at 489-90.

For these reasons, this Court and lower federal courts have consistently held that state statutes attempting to dictate the process by which the national parties select delegates to their national nominating conventions severely burden the associational rights of the national parties, and must be deemed unconstitutional absent a compelling state interest. *See, e.g., LaFollette, supra*; *Wymbs v. Republican State Executive Comm. of Fla.*, 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); *Ferency v. Austin*, 666 F.2d 1023 (6th Cir. 1981); *Ripon Society v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

In particular, it is well-established that states cannot force a national convention to seat delegates selected through an open primary who are bound to vote in accordance with the open primary's results when national party rules require delegates to be selected only by party members. *LaFollette*, 450 U.S. at 126. Moreover, in *Cousins*, the 1972 Democratic National Convention Credentials Committee had upheld a challenge to the Illinois delegation based on violations of DNC rules, and seated a rival delegation. An Illinois court ordered the official delegation seated because it had been selected in accordance with state law. The Court overturned that action, ruling that the party had the constitutional right to seat delegates in accordance with its own rules despite a contrary state law. *Cousins*, 419 U.S. at 490-91. Similarly, in *Ferency v. Austin, supra*, the court held unenforceable a Michigan statute requiring that delegates to national conventions be selected through an open primary, when DNC rules required the state party to use a process limited to declared Democrats. The court ruled that the statute could not be enforced to "control the method of selection of Michigan delegates" to the convention. *Ferency*, 666 F.2d at 1025.

In this case, California law provides that delegates to the Republican and Democratic National Conventions will be selected in accordance with the results of the presidential preference primary as certified by the Secretary of State. Cal. Elections Code § 6300 *et seq.* (governing Republican presidential primary) and § 6000 *et seq.* (governing Democratic presidential primary). It is clear that the California statutory scheme could not constitutionally be enforced to require the DNC or RNC to seat delegates chosen in a blanket primary, in violation of the parties' national rules.

The Court of Appeals correctly noted that, precisely because the RNC and DNC rules prohibit use of a blanket primary for delegate selection, "the California parties may be forced to adopt a different procedure for delegate selection other than the presidential primary. . . . " *California Democratic Party v. Jones*, 169 F.3d 646, 659 (9th Cir. 1999). The Court of Appeals suggested that the parties can make this choice "as they please without interference from the State." *California Democratic Party v. Jones*, 169 F.3d at 659.

In fact, as noted above, because of the conflict of Proposition 198 and national party rules, the California legislature enacted a law requiring the Secretary of State to report the number of votes cast for each candidate in the presidential preference primary by all voters, and separately to report the number of votes each candidate received from voters registered with each party. Cal. Elections Code § 15375(c). The separate official tally of the number of votes cast for each Democratic presidential candidate by registered Democratic voters will be used by the California Democratic Party to allocate national convention delegate

positions from California among the Democratic presidential candidates. Similarly, the separate, official tally of the number of votes cast for each Republican presidential candidate by registered Republican voters will be used by the California Republican Party to allocate national convention delegate positions from California among the Republican presidential candidates.

Thus, on March 7, 2000, there will effectively be two elections held at the same time, on the same ballot: the blanket, open primary mandated by Proposition 198, the results of which will be meaningless with respect to selection of delegates to the national conventions; and the actual votes of registered Democrats for Democratic presidential candidates and registered Republicans for Republican presidential candidates, which will be used to allocate delegate positions to the national nominating conventions.

Contrary to the suggestions of the Court of Appeals, the blanket primary mandated by Proposition 198 does represent interference by the State of California in the parties' delegate selection processes. The holding of two elections on the same ballot, on the same day, with two different results, will necessarily sow great confusion among voters and could undercut public acceptance of the results of the party-run process. For example, presidential candidate X could win, among all candidates of his political party, in the blanket primary, while presidential candidate Y could win among voters registered with that party and thereby actually win more delegates. For the State of California to create such confusion, and undermine the public credibility of the vote used by the party to award national convention delegates, is a direct interference by the state with the parties' constitutionally-protected right to "select a 'standard bearer who best represents the party's ideologies and

preferences.'" *Eu*, 489 U.S. at 224, citing *Ripon Society*, *supra*, 525 F.2d at 601.

As a matter of law, then, any effort by California to enforce its current statutes requiring the California Republican and Democratic Parties to select their delegates to the national nominating conventions through a binding primary would impose a severe burden on the associational rights of the RNC and DNC.

II. PROPOSITION 198 DOES NOT SERVE ANY COMPELLING STATE INTEREST AND, THEREFORE, IS UNCONSTITUTIONAL.

A. The State Has No Compelling Interest in Protecting the Political Parties From the Consequences of Their Own Internal Governance Decisions.

The interest asserted by the state and recognized by the Court of Appeals is that "Proposition 198 . . . enhances the democratic nature of the election process and the representativeness of elected officials," by allowing independents and members of other parties to help "frame[] the choice that they will ultimately have to make in the general election." *California Democratic Party*, 169 F.3d at 660.

This Court has rejected state interests analogous to those offered to justify Proposition 198. For example, in *Eu* the Court rejected the proffered state interests in the democratic management of a political party's internal affairs and preventing regional friction within a party from reaching critical mass. *Eu*, 489 U.S. at 232-33. Moreover, in *Tashjian*, the Court rejected the purported state interests of

avoiding voter confusion, protecting the integrity of the two-party system, and protecting the integrity of the party against the party itself. *Tashjian*, 479 U.S. at 217-25. The Court noted that the state law at issue was supposedly designed "to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point 'even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party.'" *Id.* at 224 (quoting *LaFollette*, 450 U.S. at 123-24). "In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair." *Eu*, 489 U.S. at 233.

The purported state interest of enhancing the representativeness of elected officials is not sufficient enough to justify a law that regulates who may participate in the parties' primary elections. Primaries are the critical means by which political parties select their candidates for public office. When competing for a party's nomination, candidates must and should court the voters qualified to participate in that party. This is an essential aspect of a party's First Amendment right of association. Parties hold their nominees out to the general voting public as the standard bearers of the party. Accordingly, the states have "no interest in protecting the integrity of the Party against the Party itself." *Eu*, 489 U.S. at 232 (citing *Tashjian*, 479 U.S. at 224). There is "no reason why the government should be any more able to tell the Republican Party how to choose its leaders than to tell the Mormon Church how to choose its elders." Antonin Scalia, *The Legal Framework for Reform*, Commonsense, V. 4, No. 2. (1981).

Admittedly, the states do have a strong interest in preserving the stability and effectiveness of political parties

by allowing them to settle intraparty disputes by holding primary elections. *See, cf., Storer v. Brown*, 415 U.S. 724, 735 (1974) ("The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences."); *Timmons*, 117 U.S. at 1374 (strong interest in the stability of the political process is not a "paternalistic license for States to protect political parties from the consequences of their own internal disagreements") (citations omitted); *Eu*, 489 U.S. at 227 ("Our decision in *Storer*, however, does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign."). Primaries are one of the internal mechanisms that ensure the fair and orderly resolution of intraparty competitions. However, the state has no interest, let alone a compelling one, in protecting candidates from such intraparty competitions by diluting the power of party adherents through the forced inclusion of unqualified voters.

B. By Conflicting With Party Rules, Proposition 198 Creates Intra-Party Conflict and Confusion, Precluding any Finding of a Compelling State Interest.

Rather than enhancing the representativeness of elected officials as noted, Proposition 198 creates disturbing conflicts under existing party rules, forcing confusion and disenfranchisement among voters. Under RNC Rules, Proposition 198 does not enhance the democratic nature of the election process, because the RNC is prohibited from recognizing nominees selected by blanket primary or from recognizing delegates selected through such a primary. *See* RNC Rules 34(f) and 32(b)(9). Rather, as explained above, the RNC would recognize the nominee selected by a state

party-run convention process. And the delegates from California to the parties' national presidential nominating conventions will be awarded through state party-run district and state conventions based on the separate tally of voters registered with each party, rather than based on the overall results of the blanket primary.

Thus, the blanket primary does not in fact allow independents and members of other parties to participate in "framing the choice" of the nominee of the Republican Party for President, because the votes of those independents and members of other parties literally do not count in choosing the nominee. The exact same is true of the Democratic Party. To offer California voters such an illusory, meaningless exercise – one that does not in fact affect the selection of the party's nominee – hardly enhances the representativeness or democratic nature of the election process. To the contrary, the State of California has no interest at all, let alone a compelling one, in sponsoring such a meaningless, non-binding process.

For this reason, too, the state has no compelling interest that justifies the severe burden that would be imposed by Proposition 198 on the fundamental First and Fourteenth Amendment rights of the RNC and DNC and their state party organizations.

CONCLUSION

For all the foregoing reasons, the RNC and DNC, as *amici curiae*, respectfully submit that this Court should reverse the judgment of the Court of Appeals and declare that Proposition 198 is unconstitutional under the First and Fourteenth Amendments.

Respectfully submitted,

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In the

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA AND PEACE AND FREEDOM PARTY, ET AL.,
Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA AND CALIFORNIANS FOR AN OPEN PRIMARY,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE STATES OF WASHINGTON AND ALASKA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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CASES:

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Democratic Party of United States v. Wisconsin ex rel. LaFollette,
450 U.S. 107 (1981) ..... *passim*

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Powell v. McCormack,
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State ex rel. LaFollette v. Democratic Party of United States,

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Storer v. Brown,
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Tashjian v. Republican Party of Connecticut,
479 U.S.208 (1986) ..... *passim*

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) ..... *passim*

United States v. Classic,
313 U.S. 299 (1941) 10

STATUTES AND LEGISLATIVE MATERIALS:

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Alaska Stat. 15.25.040 4

Alaska Stat. 15.25.060 4

Alaska Stat. 15.25.090 5

Alaska Stat. 15.25.100 5

Alaska Stat. 15.25.160,.190 6

Alaska Stat. 15.25.205(a) 6

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Wash. Rev. Code 29.30.005 4

Wash. Rev. Code 29.30.095 5

CONSTITUTIONAL PROVISIONS:

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OTHER MATERIALS:

2 Debates on the Federal Constitution 257
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Federal Election Commission,
Party Affiliation And Primary Voting 2000,
http://www.fec.gov/votregis/primaryvoting.htm. 2

William F. Mullen & John C. Pierce,
Political Life in Washington 66
(Thor Swanson, et al., eds., 1985) 3

INTEREST OF THE AMICI CURIAE

Primary elections are an integral part of the process for selecting public officials who will make and administer the laws under which we must live. *Storer v. Brown*, 415 U.S. 724, 735 (1974). The states share an important interest in protecting the freedom of their citizens to select, within a widely permissible range, the primary election system that they believe best serves representative democracy. "The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century, and no consensus has as yet emerged." *Tashjian v. Republican Party of Connecticut,* 479 U.S.208, 222 (1986). Amici believe this Court should allow the states to continue to engage in the debate.

The states of Washington and Alaska have had long and successful histories with blanket primary election systems. Indeed, the district court had before it substantial evidence concerning the actual experience with respect to blanket primary election systems in the state "laboratories" of democracy. After examining that experience, the district court quite properly concluded that the blanket primary election system serves compelling state interests and does not impermissibly intrude on the associational interests of political parties. (Pet. App. 42a-43a). The freedom of the citizens of Washington and Alaska to embrace the blanket primary election system – an election system that elevates candidates to public office who have the broadest unfettered support among their voters – clearly is threatened by the Political Parties' challenge to California's blanket primary.

But the threat posed by the Political Parties' challenge in this case does not end with the blanket primary election system. The challenge posed in this case directly implicates the latitude

of the states to opt for open primary election systems – indeed any system that extends the franchise in partisan primary elections beyond members of political parties. Nearly half of the states currently have such primary election systems.[1] The fundamental premise of the Political Parties in this case is that (absent a party's consent) only party members may be given the franchise in partisan primary elections, as only party members may choose what the Political Parties regard simply as the party's "standard bearer." (Pet. Brief 22, 27, 38-39). This constitutional defect that the Political Parties allege with respect to blanket primary election systems applies with equal force to open primary election systems. Thus, in a very real sense, this case does not present an isolated challenge to the blanket primary election system. It implicitly challenges the authority of the numerous states currently employing open primary systems to continue doing so, as well as the authority of states currently using other primary election systems to determine that an open primary election system would better serve the interests of their citizens.

STATEMENT OF THE CASE

A. The Washington and Alaska Blanket Primary Systems

In considering the Political Parties' challenge to California's blanket primary system, the district court had the advantage of receiving substantial evidence concerning the actual effect of a longstanding blanket primary system on political parties. Such evidence quite properly informed the judgment of the district

[1]Federal Election Commission, *Party Affiliation And Primary Voting 2000*, http://www.fec.gov/votregis/primaryvoting.htm.

court, and similarly serves to inform the judgment of this Court. Because that evidence was drawn from the experience of Washington with its blanket primary system, a brief explanation of Washington's primary election system, and its close counterpart in the state of Alaska, may prove helpful.

History And Voters. In 1935, Washington became the first state to adopt a blanket primary system. 1935 Wash. Laws 26. For the 65 years since then, Washington has conducted primary elections under this system, allowing its citizens to vote for any candidate in a primary election, without regard to candidate or voter party affiliation. The blanket primary has proven extremely popular with Washington citizens, for the freedom of choice it offers in selecting elected officials. *See* William F. Mullen & John C. Pierce, *Political Life in Washington* 66 (Thor Swanson, et al., eds., 1985) (citing statistical data reflecting a popular desire to select candidates free of party control). Although Washington does not require voters to disclose party affiliation in registering to vote or in voting, expert testimony in this case demonstrates that one-third of Washington voters "identify" as independents. (R.T. 542).

Alaska also adopted a blanket primary more than half a century ago, in 1947. With the exception of relatively brief periods when it experimented with different primary systems, Alaska has since used the blanket primary. As of 1994, approximately 54 percent of registered voters in Alaska were nonpartisan or undeclared. Approximately 23 percent were registered Republicans, 18 percent registered Democrats, and the remaining voters were split among other parties. *O'Callaghan v. State of Alaska*, 914 P.2d 1250, 1256 (1996).

Primary Election System for Major Political Parties. Washington's and Alaska's blanket primary systems operate with respect to "major political parties" similarly.[2] Any major party candidate seeking public office may file a declaration of candidacy during a statutory filing period, Wash. Rev. Code 29.15.010; Alaska Stat. 15.25.040. The names of all such candidates appear on the primary election ballot. Wash. Rev. Code 29.30.005; Alaska Stat. 15.25.060.

Under Washington law, all registered voters "may vote for their choice . . . for any candidate for each office, regardless of political affiliation and without a declaration of political faith

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[2] Washington and Alaska use different terminology to designate what might typically be thought of as "major political parties," and the two states define them somewhat differently. However, the concepts are similar. In Washington, a "major political party" is "a political party of which at least one nominee for [specified state-wide offices] received at least five percent of the total vote cast in the last preceding state general election in an even-numbered year." Wash. Rev. Code 29.01.090. There currently are two major political parties in Washington: the Democratic Party and the Republican Party. Any other political organization is defined as a "minor political party." Wash. Rev. Code 29.01.100.

By contrast, Alaska distinguishes between "political parties" and "political groups." A political party is an organization of voters who nominated a candidate for governor who received at least 3% of the vote at the preceding general election, or whose registered voters number at least 3% of the total votes cast for the office of governor in the preceding general election. Alaska Stat. 15.60.010(20). In Alaska, there are four political parties: the Republican Party, the Democratic Party, the Green Party of Alaska, and the Alaskan Independence Party. Any organized group of voters not satisfying the definition of a "political party" is referred to as a "political group." Alaska Stat. 15.60.010(19).

The term "major political party" is used in this brief to include both Washington's major parties and Alaska's political parties. Similarly, the term "minor party" is used to include Washington's minor parties and Alaska's political groups.

or adherence on the part of the voter." Wash. Rev. Code 29.18.200. Alaska's law operates in the same fashion, by providing that the primary is conducted using the same procedures as the general election. Alaska Stat. 15.25.090.

In Washington, a major party candidate in the primary advances to the general election if the candidate receives the plurality of all votes cast for candidates of the same party affiliation for the office in question, provided that the candidate also has received at least one percent of all of the votes cast for that office in the primary. Wash. Rev. Code 29.30.095. The same rule applies in Alaska, except that Alaska does not impose the additional 1% requirement. Alaska Stat. 15.25.100.

Primary Election System for Minor Political Parties. "Minor" party candidates reach the primary election ballot in Washington and Alaska somewhat differently from major party candidates, and somewhat differently in each state. In Washington, minor party candidates are selected by party conventions held immediately prior to the statutory filing period. Wash. Rev. Code 29.24.020. Thus, any minor party candidate who appears on a Washington primary election ballot is the choice of party members, and no others. A candidate certified as the nominee of a minor party may then file a declaration of candidacy and appear on the primary ballot in the same manner as major party candidates. Wash. Rev. Code 29.24. 070. A minor party candidate in Washington advances to the general election ballot by receiving at least 1% of all of the votes cast at the primary for all candidates for the same office. Wash. Rev. Code 29.30.095. This Court has upheld Washington's requirement that minor party candidates appearing on the primary election ballot demonstrate support among the entire electorate in order to advance to the general

election ballot. *Munro v. Socialist Workers Party*, 479 U.S.189 (1986).

To appear on the primary ballot, Alaska's counterpart of minor party candidates (candidates of political groups) must obtain the signatures of at least 1% of the number of voters who cast a ballot in the particular race for which the nomination is sought (or in closely aligned races for certain statewide candidacies) in the preceding general election. Alaska Stat. 15.25.160,.190. A "minor" party candidate advances to the Alaska general election ballot by receiving a majority of the votes cast for those candidates seeking the nomination of the political group. Alaska Stat. 15.25.205(a).

National Convention Delegates. Neither Washington nor Alaska employs its blanket primary to allocate delegates to the parties' national conventions. Although Washington conducts a blanket presidential preference primary, the law does not require use of the primary results in allocating delegates to the national conventions. Rather, Washington law leaves to the political parties the option of allocating convention delegates, in whole or in part, based on precinct caucuses and conventions. Wash. Rev. Code 29.19.055 (1). Alaska does not have a presidential preference primary, and its statutes are silent on the subject. Delegates to the national conventions are selected by party rule.

B. Open Primary Systems

Twenty states have open primary election systems.[3] In open primary systems, all voters are allowed to participate in primary elections, but are compelled to select a ballot listing candidates affiliated with a single political party. The selection is made at the time of voting. The details of open primary systems vary. For example, in some open primary states, the voter's ballot selection remains private. In other states, it does not. Although open primary systems differ from blanket primary systems in some respects, they share a characteristic fundamental to this case – under either system, nonparty members are allowed vote in primary elections.

SUMMARY OF ARGUMENT

"Public participation in the election of government officers is the essence of the American system of representative democracy. It is through elections, including primary elections, that public officials are chosen, that public policy is discussed and that government is legitimized." *State ex rel. LaFollette v. Democratic Party of United States*, 93 Wis.2d 473, 287 N.W. 2d 519, 539 (1980), reversed on other grounds, *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

In this case, the Political Parties assert that they have a constitutional right to restrict the franchise in state primary

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[3] *See* Federal Election Commission, *supra* note 1 (identifying Alabama, Arkansas, Georgia, Hawaii, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Vermont, Virginia and Wisconsin as employing open primary election systems and describing their features).

elections. In essence, the Political Parties assert that the states are constitutionally compelled to disregard the freely made choices of their qualified voters in primary elections, and advance to their general election ballots only party member-preferred candidates. Neither the constitution nor the jurisprudence of this Court supports such a right.

Allowing all qualified voters a choice in selecting candidates entitled to advance to the general election ballot, unfettered by the check of political affiliation, directly advances the states' compelling interest in representative democracy. In adopting blanket primary systems, states such as Washington, Alaska and California have embraced an unremarkable yet compelling view – that representative democracy is best served by allowing all of their qualified voters, not just some of them, to be freely heard at an integral point in the public process for selecting government officials. That point is the primary election.

The single aspect of party associational activities restricted by the blanket primary – the narrowing of candidates for the general election – is a critical part of the machinery for selecting public officials who derive the legitimacy to govern only by virtue of the election process. At the same time, the blanket primary system leaves political parties with a wide array of associational and expressive opportunities to advance their common political goals. Not the least of these is the opportunity to fully and fairly compete among all of the state's voters. For each of these reasons, the blanket primary system cannot be said to severely burden the associational rights of political parties.

The blanket primary is a rational, nondiscriminatory election system. It directly advances compelling state interests in

representative democracy in an appropriately tailored fashion, and imposes only a limited restriction on political party associational interests. The constitution demands no more.

Despite the Political Parties' intimations to the contrary, the essential premise of their challenge to blanket primary election systems applies well beyond this case. The premise of the Political Parties' argument, and the basis for the constitutional defect that they allege infects blanket primary election systems, is that the states may not allow nonparty members to vote in primary elections, because only party members are entitled to choose the party's "standard bearer". This premise and alleged defect apply with equal force to open primary election systems employed by nearly half of the states. These systems, no less than blanket primary systems, authorize nonparty members to vote in partisan primary elections. No principled distinction of constitutional dimension exists between the two.

Fundamentally, the constitution leaves the states the discretion to select from among a wide variety of election systems, a system that is consistent with their citizens' interests in representative democracy and that appropriately respects other constitutional values. The blanket primary election system is one among many such permissible systems.

ARGUMENT

THE STATES MAY, CONSISTENT WITH THE FIRST AMENDMENT, EXTEND THE FRANCHISE IN PRIMARY ELECTIONS TO ALL OF THEIR QUALIFIED VOTERS

A. The Constitution Does Not Grant Political Parties An Unfettered Right To Require That Their Preferred Candidates Advance To The General Election Ballot

The single aspect of party associational activities affected by the blanket primary – the winnowing of candidates for the general election – is a critical step in the process of selecting public officials who only thereby derive the legitimacy to govern. *Storer*, 415 U.S. at 735; *Munro*, 479 U.S. at 196. By their very nature, primaries serve to narrow significantly the field of candidates for office. And as this Court has recognized, in many cases the only opportunity to cast a meaningful vote occurs in primary elections. *See Newberry v. United States*, 256 U.S. 232, 286 (1921) (Pitney, J., concurring) ("As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made."); *United States v. Classic*, 313 U.S. 299, 319 (1941); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 205-6 (1996). For these reasons, it would seem beyond refute that the process of electing officers to administer government is quintessentially a matter of public, not merely party, concern. *See Smith v. Allwright*, 321 U.S. 649, 664-65 (1944) ("when [the privilege of membership in a party] is also the essential qualification for voting in a primary to select nominees for a general election

. . . the action of the party [is] the action of the state" and is of legitimate concern to the state).

As a consequence of the essential public function that primary elections serve, the Court has upheld their substantial regulation. Thus, the right of a political party to *restrict* its organizational boundaries for the purposes of selecting candidates for public office – the right asserted by the Political Parties in this case – is not unfettered. As the Court recognized in *Allwright*, 321 U.S. at 660, concomitant with the public character of primary elections is a limitation on the power of political parties to restrict their membership. In *Allwright*, the Equal Protection Clause imposed the limitation, and barred political parties from excluding racial minorities. Decisions subsequent to *Allwright* have upheld many state laws – designed to promote a variety of state interests – that imposed limitations on the primary election process.[4]

A recent example of such a decision is *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). There, the Court sustained a law that precluded political parties from placing their preferred nominee on the ballot when the candidate also had received the nomination of another political party. The Court explained, "The New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes . . . . It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate."

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[4] *See also Roberts v. United State Jaycees*, 468 U.S. 609 (1984) (private organization playing a far less fundamental public role than political parties precluded from limiting membership based on gender); *Morse*, 517 U.S. at 186 (decision by political party to impose a filing fee for delegates to state nominating convention held subject to Voting Rights Act).

Id. at 359. Weighing the character and magnitude of the burden that the state's rule placed on the New Party's claimed right against the interests the state offered to justify the burden and the extent to which the state's concerns made the burden necessary, the Court sustained Minnesota's law.

The jurisprudence of this Court simply does not stand for the proposition that a political party has free reign to control who can vote in primary or general elections and who will appear on the general election ballot. The Constitution gives the states substantial authority and responsibility for regulating elections. *See Tashjian,* 479 U.S. at 217 (The Constitution grants States "broad power to prescribe the 'Time, Places and Manner of holding elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices."). Exercising this authority, the states have enacted diverse and comprehensive election codes. To some extent, these codes invariably implicate constitutional interests in voting and in political association. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

With limited exceptions, state election regulations challenged on the basis of the right to vote or to associate for political purposes have been held to be within a broad span of constitutionally permissible regulation. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992). The test adopted by this Court to evaluate state election regulations is a flexible one: although election regulations that impose severe burdens on political party associational rights must be narrowly tailored and advance a compelling state interest, lesser burdens require less exacting review, and a state's important regulatory interests will usually suffice to justify reasonable, nondiscriminatory restrictions. *Timmons*, 520 U.S. at 358. The blanket primary

system reflects a permissible balance of state and political party interests in the system for electing public officials, and fully satisfies those constitutional demands.

B. Blanket Primary Systems Promote Representative Democracy, An Unquestionably Compelling State Interest

"[T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure and the most unbounded liberty allowed." *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969), (quoting 2 Debates on the Federal Constitution 257 (J.Elliot ed. 1876)).

The citizens of the states of California, Washington and Alaska have adopted the wholly unremarkable yet compelling view that broad-based electoral support is at the heart of political stability and governmental legitimacy. When a state's citizens choose to adopt a blanket primary either directly (as did California's) or indirectly through elected representatives (as did Washington's and Alaska's), they embrace an overarching vision of representative democracy. Blanket primary systems reflect a belief that electoral integrity, and political stability, are best advanced by an election system that elevates to public office candidates who receive the broadest support among all citizens qualified to vote, unrestricted in their choices by considerations of political party affiliation. It is difficult to identify a more forceful objective in a representative democracy than ensuring that elected officials have the freely exercised

support of the broadest possible segment of the electorate. Blanket primary systems accomplish this objective by affording all qualified voters the opportunity to vote in primary elections without artificially restricting voter choice based on the party affiliation of voters or candidates.

At the same time, blanket primary systems serve several subsidiary yet equally important state interests. In sustaining Alaska's blanket primary system against a First Amendment challenge by the state Republican Party, the Supreme Court of Alaska recognized encouraging voter turnout as among the important state interests advanced by the blanket primary. *O'Callaghan*, 914 P.2d at 1262-63. The Supreme Court of Washington identified several additional compelling interests served by Washington's blanket primary system. Among them were: "[a]llowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary." *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256, 1259 (1980). *See also Wisconsin ex rel. LaFollette*, 450 U.S. at 120-21 ("Concluding that the open primary serves compelling state interest [sic] by encouraging voter participation, the [Wisconsin Supreme Court] held the state open primary constitutionally valid. Upon this issue, the Wisconsin Supreme Court may well be correct.").

The Political Parties' effort to minimize these compelling state interests and recast them as ensuring the election of "moderate" candidates fails. (Pet. Brief 38, 42). The blanket primary system, pure and simple, ensures that those persons elevated to public office enjoy the broadest possible support of the general electorate by whose authority they govern, unfettered by artificial constraints – whether the electorate

proves "moderate" or "immoderate" in its choices. The Political Parties' call for proof of the states' interests is also unavailing. (Pet. Brief 38). The states are well-entitled to rely on these proffered interests and their reasonable assessments of the election system that best serves representative democracy, without the trial-type evidence demanded by the Political Parties. Elaborate empirical verification of the weightiness of the State's asserted justifications is not required. *Timmons*, 520 U.S. at 364; *Munro*, 479 U.S. at 195-96 ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively).

Amici take no issue with the view that strong political parties also may have a role to play in enhancing representative democracy and in contributing to political stability. Amici support the constitutional prerogative of their sister states to make such a policy judgment and to structure their election systems based on such a view. Indeed, a number of states that have adopted closed primary election systems presumably have done so believing that representative democracy is advanced in their states by enhancing the power of political parties. Amici simply submit that the constitution does not compel the states to adopt this view of what best serves representative democracy, or foreclose the states from taking a different view. The approach taken by blanket primary states is no less legitimate or compelling because it endeavors to respect a role for affiliated *and* unaffiliated voters in the primary election system. "If political parties and politically affiliated voters are to have more power in the election process, that is power taken from unaffiliated voters." *O'Callaghan*, 914 P.2d at 1262. Indeed, as the Alaska Supreme Court observed, concern with disproportionately diminishing the role of unaffiliated voters in the election process is particularly appropriate in states such as

Alaska (and Washington) that have high percentages of the electorate who are not affiliated with a political party. *Id.*

C. The Burden That Blanket Primary Laws Place On The Associational Rights Of Political Parties Is Well Within Constitutional Bounds

1. As The Courts Below Recognized, The Associational Rights Of Political Parties Have Not Been Severely Burdened By Washington's Blanket Primary

In ruling on the Political Parties' challenge to California's blanket primary, the district court was presented with substantial evidence concerning Washington's experience with its blanket primary system. The testimony heard and credited by the district court demonstrates that political parties have not simply survived under Washington's longstanding blanket primary system – they have thrived[5].

Based in significant part on evidence regarding Washington, the court below found little reason to suggest that California's blanket primary would diminish the efficacy or strength of the political parties in California by any substantial degree. (Pet. App. 35a). In this respect, the court cited a study of the political parties in the 1970's and 1980's in 13 western states, including California and Washington, "conclud[ing] that the political parties in Washington were the most competitive with one another of all 13 states." (Pet. App. 35a-36a). The court

[5] The amicus brief of the Republican Party of Alaska, et. al, asserts a plethora of "factual" allegations concerning that state's experience with Alaska's similar primary system, but is devoid of support for them.

further found that "[b]oth the Democratic and Republican parties continue to be strong political parties in Washington, and can be expected to operate with little diminution in their effectiveness in California." (Pet. App. 36a). On this score, the district court credited and summarized testimony of Dr. David J. Olson, a professor of political science at the University of Washington, and noted expert on Washington politics.

> According to Professor Olson the Washington Republican Party has been ranked as among the strongest Republican parties in the nation. Professor Olson states that the Washington Republican Party "is alive, it is healthy, it is well, it is vigorous. It is the single most important institution for recruiting candidates to run for office. It's the single most important institution for endorsing candidates. It is the most important fund-raising institution in the conduct of elections." R.T. at 527. According to Professor Olson although the Washington Democratic Party is not so dynamic as its competitor, it is still of above average organizational strength as compared to the Democratic parties of the 50 states. R.T. at 528.

(Pet. App. 36a-37a).

In addition, although the Parties argued extensively below that they would suffer from "raiding" under Proposition 198, the district court found that the political parties had failed to demonstrate any instance in which raiding determined the outcome of a primary election. (Pet App. 30a). Again, the court cited the testimony of Professor Olson:

> The potential for raiding under the blanket primary generates wide media attention and spawns electioneering lore that is simply unwarranted by actual experience.

Technically defined, raiding would occur where partisan voters of party X cross-over in sufficient numbers to help select the weakest or most vulnerable candidate in party Y. The requirements for this form of electoral subterfuge are: (1) the absence of a meaningful primary contest in party X; (2) provision of sufficient information to identify the weaker and most vulnerable potential opponent in party Y; (3) concerted action by a large enough bloc of voters in party X to influence the outcome in the primary of party Y; and (4) the abandonment of traditional party loyalties by partisan voters to enter the opponent's primary. . . . In the experience of Washington state, these requirements are simply too demanding and have not been fulfilled in actual practice. (Pet. App. 30a)

2. Case Law And History Confirm That Blanket Primary Systems Do Not Impose A Severe Burden On Associational Rights Of Political Parties

Despite the findings below and Washington's experience, the Political Parties assert that the blanket primary severely burdens their associational rights. The Political Parties seem to assert this proposition as a matter of law, on the theory that the states must disregard the uninhibited choices of the broad electorate in selecting candidates entitled to advance to the general election ballot, in favor of party-preferred candidates. This position overstates the First Amendment interests of political parties to select party nominees, and is not in keeping with this Court's jurisprudence, the nation's history or the states' experience.

Disregarding the fundamental admonishment of the Court that separating permissible election-related regulations from unconstitutional infringements on First Amendment freedoms is determined by "hard judgments" in light of the competing values involved, not "bright lines," *Storer*, 415 U.S. at 730, *Timmons*, 520 U.S. at 359, the Political Parties contend that the constitution imposes a single hard and fast rule that controls this case. They place particular reliance on *Tashjian*, which they claim grants parties an absolute right to restrict the franchise in state primary elections to party members. The Political Parties give *Tashjian* a reach that it cannot support.

Tashjian considered whether the state of Connecticut could preclude nonparty members from voting in state primary races, where the Party had invited their participation. Thus, in *Tashjian*, the Court was called upon to consider the nature of the Party's right to *broaden* its associational boundaries in the selection of nominees for public office, and to balance the severity of the state's interference with that right against the state's interests in *restricting* voter participation in an integral part of selecting government officers. In this case, by contrast, the Court must consider the nature of the Political Parties' right to *restrict* their associational boundaries in selecting candidates for public office, and must balance the nature of the state's intrusion on that right against the state's interest in *broadening* voter participation and choice in an integral part of the process for selecting government officers. In each of these respects, the instant case presents an equation starkly different from *Tashjian*. As the court below correctly recognized, *Tashjian* "had no occasion to address either the State's interests in an open or blanket primary or the burdens imposed on a political party by such a primary system." (Pet. App. 19a).

One reasonably may weigh the character and magnitude of the burden placed by blanket primary election systems on the associational interests of political parties only by considering the full scope of those interests. Although the Political Parties focus on a single aspect of their associational interests – candidate nomination – candidate nomination does not represent the universe of political party association.

In considering the significance of the burden that Minnesota's anti-fusion law placed on the New Party in *Timmons*, the Court pointed out that the party remained "free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen." *Id.* at 361. Similar opportunities for political association and expression remain under blanket primary laws. Blanket primary systems do not prohibit the alliance of party members or silence the voice of the party faithful. Political parties and their members remain free to recruit candidates, to determine and disseminate party ideology, to solicit contributions, to identify and endorse preferred candidates, to financially support preferred candidates, to vote for preferred candidates, to convince the broader electorate to support those choices, and to disavow candidates that the party does not wish to support.[6]

To the extent that blanket primary systems restrict political party associational interests, they do so only at the point where party associational activities intersect with the public process of legitimizing government. At this point, the exercise at hand

[6] In this last respect, the Court has given little credence to the argument that "voters can be "misled" by party labels. *See Tashjian*, 479 U.S. at 220 ("our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues") (quoting *Celebrezze*, 460 U.S. at 797).

is not predominantly political association or expression, but the voters' selection of candidates entitled to advance to the general election and remain in contention for public office. "Ballots serve primarily to elect candidates, not as fora for political expression." *Timmons*, 520 U.S. at 363.

In considering the character and magnitude of the claimed burden placed on the political parties by the blanket primary, it also is appropriate to note that the election systems of the blanket primary states provide automatic ballot access to all potential major party candidates. Thus, the blanket primary affords every conceivable major party nominee the opportunity to compete in a statewide election, and affords every major party the opportunity to campaign among the entire pool of registered voters. *See Munro*, 497 U.S. at 197-98. The same is true of every minor party candidate satisfying primary ballot access criteria and the party of every such candidate. In sum, the blanket primary leaves unregulated a wide array of associational and expressive activities and political opportunity on the part of political parties.

The major parties here, like the New Party in *Timmons*, claim that the state must advance the candidate of the party's choice to the general election ballot. The Political Parties assert this claim even though the candidate cannot garner a plurality of the votes of the qualified electorate for candidates of the same political affiliation, let alone for the entire slate of candidates. ("States are not burdened with a constitutional imperative to reduce voter apathy or to "handicap" an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot.") *Munro*, 479 U.S. at 198. Viewed in light of actual experience and the totality of the associational activities and interests of

political parties, the burden imposed by blanket primaries on the rights of political parties cannot fairly be considered severe. The courts below correctly so concluded.

3. The Blanket Primary Is Appropriately Tailored To Promoting The Important Interests Of The States

The blanket primary satisfies the flexible balancing test applicable to election regulations. It is a reasonable, nondiscriminatory election system that restricts a single aspect of political party associational activities, and does so only where those activities directly intersect with the public process for legitimizing government. At the same time, the blanket primary serves important regulatory interests of the states, by affording to citizens the most meaningful opportunity to participate in the selection of elected public officials. The constitution requires no more.

Nevertheless, even if the blanket primary system were viewed as imposing a severe burden on the associational interests of political parties, the system would withstand constitutional scrutiny. As the courts below held, and as the Washington Supreme Court has recognized, the blanket primary is precisely tailored to the states' compelling interest in allowing voters the broadest choice in selecting the public officials who thereby receive the authority to govern. "[T]he fundamental goal of enhancing representativeness by providing all voters with a choice that is not predetermined by party members alone can only be advanced by the blanket primary." (Pet. App. 43a). As the Washington Supreme Court found, "[T]he blanket primary . . . allows complete voter freedom . . . an open primary, on the other hand, restricts a voter to

candidates of only one party. The blanket primary is the least drastic means available to promote this legitimate interest." *Heavey*, 611 P.2d at 1259

D. The Political Parties' Fundamental Objection To The Blanket Primary Applies Equally To Open Primaries

At its heart, the theory of the Political Parties in this case is that they have a constitutional right to restrict the franchise in primary elections to party members. The fundamental objection of the Political Parties to the blanket primary is that it allows voters who are not party members to vote in primary elections, and thereby select what the party calls its "standard bearer." (Pet. Brief 22, 38-39). Although the Political Parties half-heartedly suggest that open primaries may not suffer from the same constitutional defect, it is difficult to see how this can be so. The open primary, like the blanket primary, permits voters who are not party members to vote in a partisan primary election. Thus, the open primary, like the blanket primary, allows voters who are not party members to participate in selecting party-affiliated candidates to advance to the general election – a matter that the Political Parties consider to be nothing more than selecting their "standard bearer," and strictly party business. Similarly, the open primary no less than the blanket primary, extends the franchise to persons who need not and do not share political ideology. The open primary no less than the blanket primary precludes political parties from "identifying the people who constitute the association," *Wisconsin ex rel. LaFollette*, 450 U.S. at 122, when that identification serves as the essential qualification for determining which candidates are entitled to remain in

contention for public office by advancing to the general election ballot.

The Political Parties intimate, however, that open primaries may be viewed as limiting participation to voters who are "affiliated" with a party, even though those voters have chosen not to become members of the party. (Pet. Brief at 29-30). The "affiliation" to which the Political Parties refer presumably is the requirement of open primary laws that every voter, including unaffiliated voters, select the ballot of only one political party or forfeit the opportunity to vote. The notion that such a statutorily-driven ethereal contact with a political party is of constitutional dimension, determining the latitude of the states to structure their election systems is remarkable. "If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use." *Tashjian*, 479 U.S. at 235 (Scalia, J., dissenting). *See also Wisconsin ex rel. LaFollette*, 450 U.S. at 111 n.4 (defining open primaries in terms of the absence of any declaration of party affiliation or party preference).

There is no constitutionally significant difference between open and blanket primary election systems in these fundamental respects, and no principled basis for concluding that the open primary is consistent with the associational rights of political parties if the blanket primary is not. The blanket primary states are not unique in affording the franchise in primary elections to nonparty members. Nearly half of the states do so. If the legal rule urged by the Political Parties emerges as the rule in this case, it not only will decide the validity of blanket primary election systems. It effectively will seal the fate of open primaries as well.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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March 31, 2000

Mar 31, 2000

(14)

Supreme Court, U.S.
FILED
MAR 31 2000
CLERK

No. 99-401

In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, *et al.*,

Petitioners,

vs.

BILL JONES,
Secretary of State of California, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE ALASKAN VOTERS FOR AN OPEN PRIMARY (AVOP) IN SUPPORT OF RESPONDENTS

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I

INTERESTS OF AMICUS CURIAE[1]

Alaskan Voters for an Open Primary (AVOP) is a group of about 80 Alaskan voters of all political persuasions. The Alaska Women's Political Caucus, with over 300 members (both men and women), is also a member. AVOP's interest is to uphold the constitutionality of the Alaska blanket primary statutes and retain for all Alaskan voters the broadest possible choice in the primary election. AVOP was allowed to intervene before the Alaska Supreme Court in *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996), *cert. denied*, 520 U.S. 1209 (1997), which upheld Alaska's blanket primary statutes against a similar constitutional challenge.

II

SUMMARY

AVOP submits this brief for two reasons:

1. to explain how the Alaska blanket primary election (popularly termed the "open" primary in Alaska) has historically worked and the very limited role that political parties play in it,[2] and

---

[1] This brief is filed with the written consent of all parties. These have been filed with the clerk of the court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members, or counsel make a monetary contribution to the preparation or submission of this brief.

[2] At the trial in this case, though "substantial evidence" was presented as to how the blanket primary has operated in

2. to comment briefly on important points raised in the other briefs insofar as they affect Alaskan voters.

III

ARGUMENT

A. HISTORY OF ALASKA'S BLANKET PRIMARY AND THE ROLE OF POLITICAL PARTIES UNDER ALASKA'S BLANKET PRIMARY STATUTES.

Prior to 1947 the Territory of Alaska had an open primary.[3] Voters were given a single ballot listing candidates by party in columns separated by black lines. Voters could cast ballots in only one column. Crossing the line disqualified the entire ballot. This was popularly known as the "black line" ballot.

In 1946 a blanket primary bill was introduced in the territorial legislature, but did not pass. As a compromise, the question was put to the voters in a referendum at that year's general election. It passed by a wide margin. Unofficial returns from 46 of 60 precincts showed 4,225 favoring the blanket primary and only 878 opposed (83% – 17%). The next territorial legislature passed the blanket primary bill. In the house the vote was unanimous. Four senators voted "no."

Washington for the past 60 years, such historical evidence was not presented about Alaska. According to Respondents, Petitioners' experts acknowledged that they were unfamiliar with this history. Respondents' Brief Section IV A.

[3] See Gordon S. Harrison, *Alaska's Blanket Primary: Background Information and Legislative History* (Research Request 90.294, May 23, 1990) at 2 ("Harrison"), attached as Appendix "A." This was quoted extensively by the Alaska Supreme Court in *O'Callaghan* at 1255-56.

The blanket primary issue, however, became increasingly partisan. Democrats generally opposed it and Republicans supported it. Democrats believed it eroded party loyalty and discipline and feared Republicans were using it to "raid" the Democratic primary to elect the weakest Democratic candidates. Republicans hoped to use the blanket primary to attract conservative Democrats and Independents. Independents favored the measure and party loyalists in both camps opposed it. As Dr. Harrison said,

> "Party loyalty has not been strong in Alaska, and legislators from both parties have responded to widespread public support for the blanket primary."[4]

In the first session of the first state legislature in 1959, with the Democrats controlling both houses and a Democratic governor, the blanket primary statutes were repealed and the "black line" primary reinstated.[5]

That primary was called the "**party** primary nomination." (emphasis added).[6] AS 15.25.010 provided:

> "At the party primary nomination, political parties shall nominate their candidates for the elective state executive and state and national legislative offices to be placed on the next general election ballot."

AS 15.25.030(12) required each candidate to sign a declaration under oath "that the candidate if nominated

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[4] Harrison at 5.

[5] Ch. 41 SLA 1959.

[6] AS 15.25.010-.080.

and elected will support the principles of the party he seeks to represent." AS 15.25.070 provided that no one could vote for a person whose name was not on the ballot "or vote for candidates in more than one column." "[V]otes for candidates in more than one party column shall not be counted, and [if so voted] the entire ballot is invalid." AS 15.25.080 allowed voters to declare their party preference, but did not require them to do so. Election judges were required to ask each voter if they desired to declare a party preference before giving them a ballot. The official was required to record the preference, if one was declared. *Id.*

During the next four legislatures, Republicans sought to reinstitute the blanket primary. Many Democrats also wanted it. Legislation was regularly introduced, but died in committee.

In 1966, a blanket primary bill passed the house and almost passed the senate. Legislators of both parties supported the reform. Senator Robert Ziegler (D. Ketchikan) stated,

> "The measure is vitally important to the people of this state. In Ketchikan, probably nine of every ten voting want to vote for the man, not the party."[7]

Nonetheless, the bill failed.

That year the Republicans swept both houses and took the governor's mansion. In keeping with Governor Walter Hickel's campaign promise, HB1 was introduced

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[7] Harrison at 4.

at his request. It passed 34-5 in the house, 18-2 in the senate, and was enacted as Ch. 1 SLA 1967.

The bill was entitled:

> "An act giving voters the right to vote for candidates without regard to party affiliation in primary elections."

It generally did away with all reference to the "party primary nomination," and called the August ballot the "primary election." AS 15.25.010 now provided:

> "Candidates for . . . elective . . . offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter."

The term "primary election" was also substituted throughout.

AS 15.25.030(12) continued to require a loyalty oath. AS 15.25.060 was amended to read,

> "The secretary of state shall place the names of all candidates who have properly filed in groups according to offices filed for, without regard to party affiliation."

AS 15.25.070 struck all references limiting a voter's participation to one party's primary. AS 15.25.080 was amended to require the secretary of state to provide a space in the official voter registration book where a voter might, if desired, record his or her party preference. No longer would the election judge be required to ask a party preference before handing the voter a ballot. At some point between 1967 and 1980, the loyalty oath statute was repealed. There is no longer a requirement that a candidate, even if nominated and elected, must support the

principles of their party. Nor is there any longer a statute even permitting voters to declare their party preference when they vote.[8]

On March 31, 1990, the Republican Party of Alaska ("RPA") enacted new party rules to limit its primary election to registered Republicans, registered Independents, and those who declined to state a party preference. The RPA sued the state in federal court, claiming it had a right under *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), to hold its own partly closed primary. The state entered into a consent decree, under which the Director of Elections agreed, despite the blanket primary statutes, to promulgate regulations implementing the Republican closed primary election along with a blanket primary for all other candidates and voters. Republican candidates were limited to their primary and all other candidates to the blanket primary. Eligible voters could choose either ballot, but voters registered to other political parties were limited to the blanket primary.

Two partly closed Republican primary elections, in 1992 and 1994, were conducted under the regulations. An Alaskan voter, Michael O'Callaghan, challenged the regulations in state court and in March 1996 the Alaskan Supreme Court declared them unconstitutional.[9] Since then Alaska has conducted its primaries under the blanket primary statutes.

Our state has one of the highest, if not the highest, percentages of non-partisan and independent voters. As

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[8] Section 231, Ch. 100, SLA 1980 repealed AS 15.25.080.

[9] *O'Callaghan, supra.*

of March 1 of this year, out of a total of 462,423 registered voters in the state, 112,621 were registered Republicans (24%), 76,401 registered Democrats (17%), 18,933 registered members of the Alaska Independence Party (4%), 6,966 registered Libertarians (1.5%), 3,327 registered members of the Green party (0.7%), 1,524 Republican Moderates[10] (0.3%), and 4,970 members of other parties (1%). There were also 159,231 undeclareds (34%), and 78,450 non-partisans (17%).[11] 51% of all voters register as either undeclared or non-partisan.

Under Alaska law the political parties play virtually no role in the conduct of the blanket primary. Candidates self-declare their party affiliation when they file for office.[12] As noted above, voters do not have to declare a party affiliation.[13] The parties traditionally do not endorse in the primary. Their role is mainly confined to recruiting candidates, helping to raise money, and coordinating efforts between campaigns. Under state law their only official role is to place on the primary ballot by petition a substitute candidate, if an unopposed incumbent dies before the primary election,[14] or to replace, by petition, on the general election ballot a nominee who has died, become disqualified, withdrawn, or resigned after the primary.[15]

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[10] Not to be confused with Republicans.

[11] Source: Alaska State Division of Elections printout. See Appendix "B."

[12] AS 15.25.030(a)(5) and (16).

[13] See n.10, supra, and accompanying text.

[14] AS 15.25.056.

[15] AS 15.25.110-.130.

Candidates are identified by party affiliation on both primary and general election ballots.[16] However these party labels simply help voters identify candidates politically. They do not signify endorsement or any involvement by political party organizations in the primary election process.

There is a crucial distinction between candidates labeling themselves politically and the party organizations having any authority to conduct the election. Although they participate in election campaigns, Alaskan political parties do not participate in the primary election itself any more than they participate in the conduct of the general election.

B. RESPONSE TO CERTAIN ARGUMENTS OF PETITIONERS AND SUPPORTING AMICI

1. AVOP respectfully suggests that the core issue is probably best put in the amicus brief of the Northern California Committee for Party Renewal et al., at 14: "Whether a political party or the state has the right to establish the type of primary – blanket or closed."

2. The parties claim their right of association is paramount. The states claim their right to govern the "time, manner and place of elections, is most important,[17] and the voters claim their right to vote is paramount.

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[16] AS 15.25.060, AS 15.15.030(5).

[17] US Const. Art. I § 4 Clause 1. For the equivalent state constitutional provision, see Alaska Const. Art. V § 3 ("Methods of voting, including absentee voting, shall be prescribed by law.")

That the federal constitution explicitly directs state legislators to establish federal elections and that the constitution was drafted before there were political parties should provide some weight to the states' (and the voters') position here. The constitution directs state legislatures, not political parties, to establish the method of federal elections. Unless the state is unable to justify curtailing the associational rights of political parties (as in *Tashjian*), its efforts to enfranchise large members of voters should not be struck down.

3. The Political Parties and their supporting amici generally proceed from the premise that they have the constitutional right to control blanket primary elections, even in the face of state law. They must concede that, if this premise fails, so does their argument.

Yet:

a. 23 states "use some version of the open primary,"[18] three have blanket primaries,[19] and Louisiana has a nonpartisan primary. The primaries in these 27 states have been free from control by political parties for many years. This is powerful evidence of their constitutionality.

On the other hand, invalidating California's blanket primary will have severely disruptive political consequences across the country. This Court should not take such a step lightly.

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[18] Amicus brief for the Brennan Center at 5 n. 8 and accompanying text.

[19] Alaska, California, and Washington.

None of the 23 open primary states or Louisiana has participated in this case (nor has the federal government which, itself, has an interest in maintaining political stability in the states). Surely, if they felt their primary election systems were seriously threatened, these states would be participating. If the Court is inclined to declare most states' primary election laws unconstitutional, they should at least be notified and invited to participate. And there may well be other citizen groups like AVOP, who would want to file amicus briefs. (This was the step the Alaska Supreme Court took when the Alaska case was initially argued).[20]

b. Every court that has considered the constitutionality of blanket primary statutes against the challenge raised here has upheld it. *Heavey v. Chapman*, 93 Wash.2d 700, 611 P.2d 1256 (1980), *O'Callaghan v. State of Alaska*, supra, and *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999). Only one jurist, Justice Rabinowitz of the Alaska Supreme Court, has even dissented. *O'Callaghan v. State of Alaska*, supra, at 1264.

c. As the other briefs have pointed out, the case upon which the Political Parties primarily rely, *Tashjian v. Republican Party of Connecticut*, supra, was the opposite factual situation. There one political party wanted to open up its primary and the state wanted to close it. The issue and the important public policies of expanding the franchise are different here.

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[20] See *O'Callagahn v. Coghill*, 888 P.2d 1302 (Alaska 1995) (Order and Memorandum Opinion). That published order was virtually without precedence since statehood.

But something else is different, too. That case was decided on a 5-4 vote in this Court. All members of that majority are gone, and all the dissenters remain. Now may be a good time to re-examine the holding in *Tashjian* to determine whether it has any application beyond the unusual factual pattern presented. Does this Court want that case to be the legal precedent for overturning the open, blanket, and nonpartisan primary election statutes in 27 states? Was this result envisioned when that case was decided? And, most importantly, did it represent the best public policy decision at the time?

AVOP suggests that it **did** (because it expanded the franchise), but the contours of that case should be carefully delineated now, so that it cannot be similarly misinterpreted in the future. This case presents the opportunity to clarify *Tashjian* and, at the same time, strengthen the right to vote.

Political parties may not like it if they cannot seize control of the blanket and open primary election process, but they certainly will understand why. And that, too, will provide important stability to the political process.

IV.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Legislative Research Agency

May 23, 1990

MEMORANDUM

TO:

ATTN:

FROM: Gordon S. Harrison, Director

RE: Alaska's Blanket Primary: Background Information and Legislative History
Research Request 90.294

You asked for background information about Alaska's blanket primary (AS.15.25.060), including its legislative history.

State Primary Election Schemes

State primaries are broadly categorized as closed, open, or blanket, although the actual variation in systems is far greater and more subtle than this simple classification scheme suggests. Closed primaries require the voter to declare a party preference before election day, usually at the time of registration. At the polling place, the voter is given a ballot listing only candidates of the party of his or her declared preference.

Open primaries differ from closed primaries only with regard to the declaration of party affiliation before election day. Like voters in a closed primary, voters in open primaries are limited to casting ballots for the candidates of a single party. However, voters in open primaries are asked at the polling place to name the party ballot they want to vote, or they are given both ballots and choose which to vote in the privacy of the booth.

In a blanket primary, voters have the opportunity to vote for candidates from all parties that qualify for the ballot. Candidates are listed by office, and the voter can select one candidate per office. This ballot permits voters to cross from one party to another as they move through the list of elective offices.

Twenty-one states have open primaries, and 26 have closed primaries. Only three states have blanket primaries: Alaska, Washington and Louisiana. The Louisiana blanket primary differs from the primaries in Alaska and Washington in that the two candidates for each office with the most votes, regardless of party, qualify for the general election.

Alaska first adopted the blanket primary in 1947, during territorial days. Prior to that time Alaska had an open primary: at the polls, voters were given a single ballot listing the party candidates in two separate columns. Voters could vote in only one column.

In the special legislative session of 1946, when both houses of the legislature were overwhelmingly dominated by Democrats, a conservative Juneau Democrat, Curtis Shattuck, introduced House Bill 4 which would have changed the open primary to a blanket primary.

While the bill did not have sufficient support in the House to pass, there was enough interest to keep it alive. The compromise was an amendment to put the question before the voters in a referendum at the next general election (October 8, 1946). The amended bill passed the House with no dissenting votes, and it passed the Senate with only three dissenting votes.

The referendum to adopt the blanket primary passed by a wide margin.[1] There was apparently little public discussion of the issue preceding the referendum, in part perhaps because it was overshadowed by a second referendum on the same ballot – a referendum on the hotly debated question of statehood. In any case, the public seems not to have been aroused by the question of a blanket primary. The *Anchorage Daily Times* opined that the proposal "has received virtually no publicity and the vote on it will probably be unintelligent." The newspaper editorial said "nobody seems to know what it is all about." It continued:

> . . . inasmuch as the two parties in Alaska are different only in leadership and in their position as "in" or "out" of power, it can be argued that the blanket ballot would be appropriate here.
>
> Both parties are interested in developing Alaska. Either one would follow a program very similar to the other should it be placed in power. It has been said that the voters, during the primary election, separate into two parties for the purpose of eliminating some candidates for

---

[1] Unofficial returns from 46 of the 60 precincts reported in the *Anchorage Daily Times* on October 10, 1946, showed 4,225 in favor of the blanket primary and 878 opposed.

> public office and nominating others. The general election is a continuation of this process, only with the voters all using the same ballot with the candidates of the parties on the same list. Therefore, it is argued, there would be nothing lost by having a blanket ballot in the primary.
>
> We have heard no argument that is, by itself, convincing. We believe that Alaska will fare just as well no matter what form of ballot is used.[2]

A blanket primary was dutifully adopted by the Eighteenth Legislature in 1947. It passed without a dissenting vote in the House, and with two Democrats and two Republicans casting no votes in the Senate.

Increasingly, however, the question of the blanket primary became a partisan issue. Democrats tended to oppose it; Republicans to support it. Democrats believed that it eroded what little party loyalty and discipline existed in Alaska, and they thought that Republicans used it to their advantage by crossing party lines in the primary to elect the weakest Democratic candidate. Republicans supported the blanket primary in hopes that Republican candidates would benefit by attracting conservative Democrats and non-aligned voters.[3]

Despite the overall partisan flavor that the issue was to acquire (with Republicans for and Democrats against the blanket primary), opposition existed on the part of some

---

[2] *Anchorage Daily Times,* October 7, 1946.

[3] Interview with Judge (Ret.) Thomas B. Stewart. See also Herman E. Slotnick, "Alaska: Empire of the North," in Frank H. Jonas, ed. *Politics in the American West* (Salt Lake City: University of Utah Press, 1970).

Republicans, and support existed on the part of some Democrats. In general, party stalwarts and those who believe in the importance of strong parties in the political process, opposed and continue to oppose the blanket primary. Those who are not firmly aligned with a political party, and who believe that the voter should have maximum independence in balloting matters, support the blanket primary. Party loyalty has not been strong in Alaska, and legislators from both parties have responded to widespread public support for the blanket primary.

In the first session of the first state legislature in 1959, when Democrats firmly controlled both houses and the governor's office, the blanket primary was replaced by the single ballot open primary.[4] Adoption of the comprehensive election code in 1960 incorporated this change.[5]

Republicans led the opposition to the single ballot open primary, although many Democrats also sought a return to the blanket primary. Several bills were introduced to restore the blanket primary, but they languished in Democratic-controlled committees. In 1966, during the second session of the Fourth Legislature, a blanket primary bill passed the House and almost passed the Senate. Senate debate on the measure was reported in the *Anchorage Daily Times.*[6] Democrats Jim Nolan of Wrangell, Robert Blodgett of Teller, and Robert Ziegler of Katchikan spoke in favor [of] the bill. Senator Blodgett is quoted saying:

---

[4] Chapter 41 SLA 1959 (HB 8).

[5] Chapter 83 SLA 1960 (CSHB 252).

[6] March 28, 1966.

> The Democratic party is a hollow shell. The Republican party is a hollow shell. How many people actually are active workers in the two parties? Darned few. I support the bill."

Senator Ziegler is reported to have said:

> The measure is vitally important to the people of this state. In Ketchikan, probably nine of every ten voters want to vote for the man, not the party.

Despite this bipartisan show of support, the bill failed to pass the Senate.

The general election of 1966 broke the Democratic monopoly on legislative power which had existed since the 1950s: Republican majorities were elected to both Houses and Republican Walter Hickel was elected governor. The blanket primary was thereupon restored during the first session of the Fifth Legislature.[7] The bill to restore the blanket primary was introduced at the request of Governor Hickel, but it attracted considerable bipartisan support. Among the 35 yeas in the House, nine were cast by Democrats; of the five nays, four were cast by Democrats. In the Senate the bill received 18 yeas, four of which were cast by Democrats. Both nays in the Senate were cast by Democrats.

The blanket primary seems to suit Alaska, where party ties and party organizations are weak.[8] However, some

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[7] Chapter 1 SLA 1967 (HB 1am).

[8] More than half of the voters in Alaska are registered as independents. See Carl E. Shepro, "Alaska's Political Parties," Gerald A. McBeath and Thomas A. Morehouse, eds. *Alaska State Government and Politics* (Fairbanks: University of Alaska Press, 1987).

Democratic and Republican party loyalists, who lament the decline of political parties, prefer a more conventional (open or closed) primary that restricts voters to casting ballots for one party's candidates.

I hope this information is useful to you. If you would like additional information, please contact the agency.

VREMS TIME: 09:04 — STATE OF ALASKA – DIVISION OF ELECTIONS — DATE: 03/01/2000
GVRR28OP-RZ (GBVREMS) — NUMBER OF REGISTERED VOTERS BY PARTY WITHIN DISTRICT — PAGE: 1

	TOTAL	DEM	REP	AT THE	GREEN	NEW PPP	REP MOD	UNDECL	LIBERT	OTHER
REGION 1 REGION I										
DISTRICT										
1	10,906	1,642	2,494	479	54	2,025	20	4,047	12	133
2	11,899	2,078	2,228	486	116	2,398	23	4,425	12	133
3	12,375	3,038	1,804	427	182	2,689	23	4,079	21	112
4	11,911	2,029	2,420	407	83	2,692	22	4,102	15	141
5	10,449	1,953	1,713	602	117	2,147	24	3,700	12	171
6	10,201	1,492	2,443	343	42	1,497	21	4,235	29	99
7	12,886	1,708	2,936	532	264	2,578	46	4,576	87	159
8	12,075	1,568	3,148	529	74	2,178	56	4,310	85	127
9	10,303	1,392	2,827	430	28	1,918	39	3,464	93	112
TOTAL REGION I (107) PRECINCTS)	103,005	16,910	22,013	4,235	960	20,122	274	36,938	366	1,187

	TOTAL	DEM	REP	AT THE	GREEN	NEW PPP	REP MOD	UNDECL	LIBERT	OTHER
REGION 2 REGION II										
DISTRICT										
10	12,367	1,612	4,024	279	49	2,315	41	3,743	213	90
11	11,457	1,739	3,041	376	63	1,905	57	3,821	322	133
12	11,517	1,598	3,147	348	51	1,966	41	3,972	299	95
13	12,478	2,273	2,950	379	134	2,389	39	3,883	303	128
14	12,599	2,097	4,215	307	37	1,220	50	4,311	259	103
15	11,792	2,356	2,085	531	147	1,842	43	4,125	520	143
16	10,911	2,453	1,745	613	91	1,311	42	3,904	590	162
17	14,046	2,172	3,763	444	66	1,918	76	5,057	422	128
18	13,650	1,880	3,897	299	165	2,883	60	4,176	249	121
19	13,119	2,042	3,372	433	94	1,976	43	4,652	385	122
20	11,204	1,961	2,720	294	69	1,955	55	3,670	346	126
21	11,022	2,088	2,597	404	83	1,750	40	3,756	408	96
22	13,267	2,182	3,836	296	59	2,216	64	4,241	249	124
23	10,653	2,076	3,105	278	31	1,004	37	3,829	199	99
24	12,198	1,832	3,952	300	52	1,784	51	4,014	209	84
25	12,112	1,513	3,780	403	42	1,978	42	4,037	1292	125
26	12,647	1,457	3,653	502	49	2,094	64	4,423	259	136
27	14,574	1,718	3,949	627	91	2,693	89	4,949	315	143
28	15,887	1,663	3,955	852	102	2,848	85	5,807	379	204
TOTAL REGION II (139 PRECINCTS)	257,505	36,632	63,604	7,965	1,475	37,960	1,019	80,370	6,118	2,362

REGION 3 REGION III DISTRICT	TOTAL	DEM	REP	AT THE	GREEN	NEW PPP	REP MOD	UNDECL	LIBERT	OTHER
29	12,462	2,131	2,478	355	278	2,582	25	4,414	64	135
30	10,492	1,891	2,462	395	69	1,832	26	3,684	39	94
31	10,663	1,977	2,283	539	52	1,764	42	3,823	41	142
32	11,275	2,098	3,323	331	37	1,268	22	4,074	36	94
33	12,533	1,513	3,642	524	81	2,230	26	4,297	65	155
34	12,939	1,727	4,626	387	68	1,501	33	4,451	37	109
35	10,313	1,386	2,482	418	123	1,975	19	3,704	80	126
36	9,041	1,855	1,497	770	67	1,762	9	2,889	48	144
TOTAL REGION III (189 PRECINCTS)	89,718	14,570	22,793	3,719	775	14,914	202	31,336	418	999

REGION 4 REGION IV DISTRICT	TOTAL	DEM	REP	AT THE	GREEN	NEW PPP	REP MOD	UNDECL	LIBERT	OTHER
37	8,852	2,228	1,125	993	38	1,231	7	3,105	23	102
38	8,161	2,310	1,009	875	26	1,493	5	2,296	17	130
39	9,077	2,678	948	839	28	1,626	6	2,817	20	115
40	6,105	1,073	1,129	307	25	1,104	11	2,369	12	75
TOTAL REGION IV (98 PRECINCTS)	32,195	8,289	4,211	3,014	117	5,454	29	10,587	72	422
STATE TOTAL (453 PRECINCTS)	462,423	76,401	112,621	18,933	3,327	78,450	1,524	159,231	6,966	4,970

AMICUS CURIAE

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U.S. Const. art. I, § 2, cl. 2 7

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William F. Mullen & John C. Pierce, *Political Life in Washington* 66 (Thor Swanson, *et al.*, eds., 1985) 16

Wash. Rev. Code 29.19.045-.055 (1996) 17

INTERESTS OF AMICI[1]

Amici university law professors have extensive professional experience and personal interest in the study of constitutional law, particularly as applied to the American political system. They have concluded, as further indicated below, that the California blanket primary system fits well within the constitutional framework defining powers of states and protections for voters which this Court has developed. The California blanket primary – and the laws of many other states with blanket or open primaries which are implicated herein – should be upheld.

The Hispanic Republican Caucus has a particular concern in protecting rights of members of minorities to participate in the political system and has reached the conclusion that the California blanket primary is constitutionally valid because it serves to protect and advance compelling interests of such voters, including the long-term interests of the parties. Members include a recent minority leader of the California State Assembly.

William E. Brock and John McCain are long-time participants in the political process. Senator Brock was a United States Senator and Chair of the Republican National Committee for the years 1977-1980. Senator

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[1] Pursuant to Rule 37.6 of the Rules of this Court, Amici state the Respondent Californians for an Open Primary contributed to the preparation and submission of this brief, but that no counsel for a party authored this brief in whole or in part. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of the brief, and the consent letters have been filed with the clerk of the Court.

Article IV, Section 4 of the Constitution guarantees "to every state in this union a republican form of government." This section of the Constitution has never been held to impose a single conception of what it means to have "a Republican form of government." *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), much less to prescribe a single system of elections.

For the federal offices for which the Constitution requires some form of election processes, the Constitution directly confirms in the states the authority and responsibility to establish and regulate the elections. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). This is most explicitly stated through the Constitution's grant to states of broad power to prescribe "the times, places and manner of holding elections for senators and representatives." U.S. Const., art. I, § 4, cl. 1. This election power is matched by state control over the election process for state offices.

Exercising this authority and their own authority to conduct the far more numerous state and local elections, the states have enacted diverse and comprehensive election codes. Constitutional interests in voting and in political association are both implicated and protected and enhanced hereby. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). These interests are derived both from the United States Constitution and from the states' own constitutions.

Primary elections are conducted through a variety of systems ranging from "closed" to "open" and "blanket" throughout the United States. *See Tashjian*, 479 U.S. at 222,

n.11, setting out the wide variety of state primary systems. The range of options for primary elections is illustrated in the historic changes made in this case. The people of California determined by initiative vote to go from a "closed" to "blanket" primary based on their experience and perceived interests.

This is as intended under the United States Constitution. At the time of the Constitution, the constituent states of the United States already had their own special systems of election to protect their citizens' rights. The "powers" to do so were surely among the powers "reserved to the states respectively or to the people" under the Tenth Amendment.

The states conducted these elections before and after ratification of the Constitution. Only later did political parties evolve. Concurrently, the states evolved differing systems to select candidates for the general election. In the earliest days of the Republic, candidates were often chosen informally by a consensus of locally prominent persons (similar to town meetings which continue today in some states).

With the emergence of more formal political parties, candidates were winnowed through differing state nomination processes, including petitions, caucuses, party conventions, and later a variety of primary election systems. The states then placed "party candidates" on general election ballots. Today, all states either require or make available primary elections for nomination of candidates for elections to the U.S. Congress and for most state legislative and executive positions. However, about

a third of the states still use caucuses for one or both parties' nomination of presidential candidates.

Two principal textual limitations on state power to regulate candidates for federal office elections are the qualification clauses governing the election of members of Congress, and the ban on religious tests for office. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). The text of the original Constitution is designedly silent concerning the rules governing candidate selection processes by states for elections at the state and local level. State and local elections were surely viewed as matters governed by powers of the states (preserved under the Tenth Amendment). *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Thomas, J. dissenting opinion at 845); *Oregon v. Mitchell*, 400 U.S. 112 (1970).

Decisions of this Court dealing with six constitutional amendments[2] have helped define modern contours of the right to vote, the right to run for office, and the right to fair representation. Within this framework the states remain free to experiment and decide how best to protect their citizens' rights. States are free to experiment with direct democracy, *e.g.*, through initiative and referendum, to use nonpartisan registration and elections for

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[2] The Fifteenth Amendment protects the right to vote. The Seventeenth Amendment requires popular election of Senators. The Nineteenth Amendment guarantees the right to vote to women. The Twenty-third Amendment permits residents of the District of Columbia to vote for President. The Twenty-fourth Amendment bars the poll tax in federal elections. The Twenty-sixth Amendment grants the vote to persons over 18. Most importantly, this Court has construed the First and Fourteenth Amendments as protecting basic rights to participate in elections.

some offices and even term limits for state and local officials (which have been held invalid for congressional office only because of the specific "qualifications clause," art. I, § 2, cl. 2).

The power of states over elections for state offices is not so constrained as it is where the federal offices are involved. *Compare Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997), *cert. denied*, 523 U.S. 1021 (1998) with *U.S. Term Limits, supra. See also Oregon v. Mitchell, supra.*

As a very general proposition, this Court has held laws excluding voters and closing elections to be suspect under the Fourteenth (or, more rarely, the Fifteenth) Amendment analysis. For example, the "white primary" cases, cited p. 10, *infra*, held invalid laws restricting voters who participated in the primary elections. Most recently *Rice v. Cayetano*, 68 U.S.L.W. 4138 (February 23, 2000), applied the Fifteenth Amendment to special state elections, holding that special Hawaiian elections could not be closed to most people of that state in violation of that amendment.

II. THE STATE MAY ACT TO ADVANCE IMPORTANT CONSTITUTIONAL INTERESTS BY INCREASING AND PROTECTING VOTER PARTICIPATION

This Court has frequently reflected the overriding importance to citizens and to our very democracy of the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

In our democracy, that all citizens should enjoy the right to vote is not just a theoretical value. The exercise of that right to vote must also be encouraged and protected. The actual application of the right through participation in the election process is separately important to the democracy.

Elections do not just serve to select officials. Participation in the election process serves the separate purpose of legitimizing the government. "Public participation in the election of government officers is the essence of the American system of representative democracy. It is through elections, including primary elections . . . that government is legitimized." *State ex rel. LaFollette v. Democratic Party*, 93 Wis.2d 473 (1980), *rev'd on other grounds, Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981). This important purpose is served by state and local elections as well as those for national office. This important legitimizing purpose is served to a degree roughly proportionate to the amount or percentage of participation by the citizenry in elections. Thus, when the participation is increased as the blanket primary has done, the government is further legitimized.

Soon after the Constitution's ratification, the Framers adopted the Bill of Rights with the understanding they would thereby further protect the citizens and the states. The avowed intent was also to reinforce the newly created democracy. The First Amendment serves to protect individuals *and* to reinforce democracy by preserving the freedom of individuals to engage in behaviors important to democracy. Public participation through exercise of the right to vote is "the essence" of the democratic process.

The Constitution allows states to balance other constitutional interests and even to restrict First Amendment rights where necessary to preserve and expand participation in the democratic election process. In *Burson v. Freeman*, 504 U.S. 191 (1992), this Court upheld a ban involving core First Amendment interests; political speech in the election poll area. The absolute ban was upheld where the state determined this protection was necessary to improve the experience of voters who participate in elections.

The interests served in adopting the blanket *primary* system are similar; to enhance voter participation while broadening each voter's choices. These interests in a primary election are as important as those in the *general* election because the primary is a critical step in the process of selecting public officials. *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986).

In many states and many elections the only opportunity to cast a meaningful vote occurs in the primary. Often because of factors, such as one-party dominance, "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry v. United States*, 256 U.S. 232, 286 (1921) (Pitney, J., concurring); *United States v. Classic*, 313 U.S. 299, 319 (1941); *Morse v. Republican Party of Va.*, 517 U.S. 186, 205-06 (1996). The same is often true in California where a majority of legislative districts are "safe" for one party according to expert analysis and testimony below. JA 191.

This makes doubly important the need to consider and protect the rights and opportunities of voters in

primary elections. This Court recognized this factor first in the "white primary" cases: *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 491 (1953). The decisive character of primary elections weighed strongly in this Court's determination to invalidate the laws allowing political parties to control primaries (rebuffing a similar claim of associational rights to that advanced by the political parties here). It can now be concluded that the long-term effects on both parties from these decisions were undoubtedly beneficial. Minorities thus allowed to participate in elections later joined and strengthened *both* parties.

Here the State and its people (by initiative) have acted to expand the ability of all California's people to participate in the democratic process. California's primary system likely has a beneficial impact even on parties – thus serving directly to implement and protect rights of all citizens of the State.

Indeed, the contrary argument of the political parties that the citizens were deprived of their rights is especially disingenuous where overwhelming numbers of Californians of all parties and demographic groups and regions voted to adopt this blanket primary to protect their accurately perceived constitutional interests. (*See* expert testimony below analyzing support for blanket primary, JA 176-178.) Further, the political parties have each already benefitted by receiving increased vote totals (ultimately reflected at other levels such as party volunteers or contributions).

When the state acts to protect and expand participation in the democratic process, First Amendment values support the state action. This is especially true where the state action was adopted by direct vote of the people, and majorities supported the initiative from all parties, demographics and geographic areas. The people are especially suited to determine their own interests and how to protect them.

Each court which has considered a blanket primary has upheld such a primary law and confirmed the constitutional interests thereby advanced. Several courts have also specifically concluded that the political parties' fears and claims were unsubstantiated (or exaggerated as found by the court below). It is significant that these courts have usually been state supreme courts closely conversant with the citizens' interests – these state judiciaries are often directly elected.

In *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 120-21 (1981), this Court summarized one state supreme court decision:

> The Wisconsin Supreme Court considered the question before it to be the constitutionality of the "open" feature of the state primary election law. . . . by encouraging voter participation, the court held the state open primary constitutionally valid. Upon this issue, the Wisconsin Supreme Court may well be correct.

Democratic Party at 120-21 referencing *State ex rel. LaFollette, supra.*

The Supreme Court of Alaska similarly upheld Alaska's blanket primary system against a First Amendment challenge, specifically recognizing that encouraging voter turnout was among the important state interests advanced by the blanket primary. *O'Callaghan v. State of Alaska*, 914 P.2d 1250, 1262-63 (Alaska 1996).

The Supreme Court of Washington after considering 55 years' implementation of that state's blanket primary found that there were three separate compelling interests served by Washington's system *and* that the political parties had demonstrated no substantial burden on fundamental rights:

> Have plaintiffs shown a substantial burden? Not only have they not shown a substantial burden, but they concede they cannot do so. . . .
>
> . . . .
>
> . . . [There are three] compelling state interests which support a blanket primary . . . allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary.

Heavey v. Chapman, 611 P.2d 1256 at 1258-9 (Wash. 1980).

Washington does not allow party registration of voters and has constitutional provision requiring "absolute secrecy in preparing and depositing his ballot." Wash. Const. art. 6, § 6. The interest in voter privacy is important, and Washington voters have resisted any state requirement of party identification. Of course, the blanket primary serves the same privacy interests of voters in

California. The political parties' argument here would frustrate this interest by making voters declare a party – before they are willing to do so – which then becomes a "public record."

III. THE RECORD CONFIRMS THE STATE'S (VOTERS') JUDGMENT THAT A BLANKET PRIMARY SERVES TO SIGNIFICANTLY ADVANCE COMPELLING INTERESTS AND BENEFITS THE PARTIES

A state is not required to quantify or prove problems in the election system – or a "cost-benefit" analysis – *before* improving the election process. "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively. *Munro*, 479 U.S. at 195-196. Here, however the record proves both the problems of the old closed primary system and benefits of the blanket primary. This record confirms the judgment of the states that a blanket primary enhances the rights of voters and democratic interests.

Under the blanket primary, each voter has a broader range of choices, and every voter has a chance to participate in both important stages of the election process. Even a careful and conscientious voter who doesn't finally decide until the date of the primary is not barred from expressing that opinion by vote (even if it *is* too late to change party registration). The satisfaction derived by each voter from participation, and the concurrent incentive to participate and support, is also unquantifiable.

However, it can be said that the voters are the appropriate judges of these intangible interests and their relative importance (relative to the same voters' associational interests in political parties).

Other results from adoption of the blanket primary are quantifiable. The most important is probably voter participation, a matter of significant concern throughout this Country. For many years, California primary elections had showed a dramatic decline in participation. A similar decline in general election turnout in California – but different in amount – also was cause for great concern. *See* expert Field, showing a 15-20% decline in last 30 years – "marked and significant decline over the last 30 years." JA 201. The decline in turnouts in the two phases of the election are related.

Historical data also showed that there was a significant difference between the lower California turnout *before* adopting the blanket primary and the substantially better turnout record of western states which had previously adopted the blanket primary. *E.g.*, in 1996, congressional races in California had a 43% turnout whereas the blanket primary states enjoyed turnout over 55%. Gerber RT 682. This strongly supported the argument that blanket primaries would encourage voter participation in both primary and general elections.

Election statistics from California's first blanket primary elections confirmed the expectation that primary voting participation would dramatically increase with implementation of the blanket primary. It was conceded below by the political parties in 1997 that allowing the

(approximately) 1.5 million independent voters to vote in the blanket primary would likely boost turnout. Field JA at 202. (RT 658-659). By 2,000 there were 1.8 million California independent voters able to vote in the primary. This increase alone could be argued to justify the change to a blanket primary.

By the time of trial, the blanket primaries which had been conducted in California also confirmed the anticipated dramatic increase in voter turnout. (*See also* Respondent Second Lodging for public records of June 1998 and March 2000 California elections.) This aspect of the State's (voters') judgment as to the merits of the blanket primary is clearly vindicated. There was a total increase of over a million and a half votes. Separately *each* of the petitioner political parties enjoyed a substantial increase in votes for their party. The mid-term general election turnout also increased approximately 2.4%, partially reflecting the effects of drawing more voters into the election in the primary. (Issues and candidates at all levels undoubtedly also have significant impacts on turnout.)

Similar fears to those of the parties here had been considered by this Court in *Tashjian*, 479 U.S. 208:

> . . . appellant's direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 states which have chosen to permit more substantial openness in their primary systems . . . .

479 U.S. at 233, n. 12.

among if not *the* most, highly competitive at last [sic] in part due to the blanket primary." JA 142.

The expert testimony to the court below about Washington's experience generally updated and reflected similar proof submitted to Washington courts when the Washington Supreme Court had upheld the Washington blanket primary years earlier. *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980) quoted supra, p. 6.

The historical evidence thus addressed – and rebutted – the arguments or fears of the political parties which are repeated here. The Court below made a specific holding on the issue of the impact on parties finding the blanket primary system to be a "significant but *not* severe burden on their associational rights." (Br. in Opp., App. at 27, 35.) As noted above, there is a strong reason to conclude the long-term impacts on political parties are actually positive. *See, also,* Professor Olson's Summary Report, JA 133-152.

An important separate concern is the effect of the blanket primary on minority voters and candidates. The Washington expert (Dr. Olson) considered the historical record and concluded: "Thus, the blanket primary appears to be a neutral instrument when it comes to favoring or disfavoring racial minority voters and candidates." JA 149. *See, also,* JA 129.

Other expert testimony in the court below was much more positive about the empowering impact of the Washington blanket primary on minorities and women: "Any allegation that the blanket primary inhibits women and minorities from winning office is also refuted by Washington's experience," going on to document the fact

Washington has unusually high minority and women participation – *e.g.*, the highest percentage of women in any states legislature JA 194 (Quinn Report, favorably cited through Circuit Court Opinion).

A similar conclusion has been reached by the California Hispanic Republican Caucus, indicated by their participation as amici in this brief supporting the blanket primary. Especially with long-term demographic changes in minority populations, the parties will benefit through a primary system which allows or encourages early affiliation by minority voters through primary participation – leading to general election and other longer term support.

Amicus William E. Brock, a former national party chairman, had observed similar effects: the Republican Party was benefitted by the opening of primaries in that party's efforts to become viable in previously one-party southern states. The party became competitive and now often enjoys a majority in some states – in part because of the open primary system. Of course, *Tashjian*, 479 U.S. 208 (1986), reflected a similar conclusion by the same party in another state. A party rule sought to open its primary – but was frustrated by state law (dictated by the other party). Indeed, the facts in *Tashjian* reflect that both parties expected a positive effect on the minority party's building efforts.

Amicus John McCain has recent experience illustrating the related conclusion that either national party could benefit through attracting and allowing voters to participate in that party's primary – without first requiring full party registration.

CONCLUSION

The blanket primary is a constitutionally valid state regulation of elections which protects the constitutional interests of voters. The decision below should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE AND FREEDOM PARTY, et al.,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA and CALIFORNIANS FOR AN OPEN PRIMARY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CALIFORNIA GOVERNOR GRAY DAVIS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the First Amendment prohibits California's voters from adopting the blanket primary, which allows voters of any political affiliation to vote for any candidate in the primary.

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CONSTITUTIONAL PROVISION

California Constitution, article V, § 1 1

INTEREST OF AMICUS CURIAE[1]

Governor Gray Davis, thirty-seventh Governor of the State of California, has several important interests in urging this Court to uphold the State's blanket primary. As ***Governor***, Gray Davis has an interest in seeing that the Open Primary Act is faithfully executed. Cal. Const., art. V, § 1. As California's ***highest constitutional officeholder***, Governor Davis represents the interests of all Californians, who exercised their sovereignty through their initiative power in adopting the blanket primary. As a ***candidate*** – the first Governor elected under the blanket primary – Governor Davis has an interest in preserving an election process that provides all candidates the opportunity to attract support from the entire electorate.

SUMMARY OF ARGUMENT

Since its enactment in 1996, the blanket primary has enhanced the democratic nature of California's elections by encouraging candidates to appeal to the entire electorate, by increasing debate and participation, and by producing candidates who are more reflective of the entire citizenry.

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[1] This brief is filed with the written consent of all parties, on file with the Clerk of the Court. This brief is not authored, in whole or in part, by any counsel for a party. Nor did any person or entity make a monetary contribution to the preparation or submission of this brief.

Adopted by a direct vote of the people through the initiative process, the blanket primary represents the considered judgment of the citizens of California as to how to structure their electoral process. California voters chose a more democratic system in the hopes of selecting officials who would be reflective of the entire electorate. This is a political decision to be made by the voters, not the courts. The blanket primary does not severely burden California's political parties, and the desire of party officials for party control of a critical stage of the State's electoral process should not override the voters' First Amendment rights. The First Amendment simply does not prohibit the citizens of California from adopting an electoral system that increases the democratic nature of the State's elections.

ARGUMENT

I.

THE BLANKET PRIMARY HAS ENHANCED THE DEMOCRATIC NATURE OF CALIFORNIA'S ELECTIONS

California has conducted two elections since the voters adopted the blanket primary in 1996.[2] In 1998, Governor Davis was nominated in the first gubernatorial

[2] Respondents have lodged with the Court the statement of the vote of California's two blanket primaries to date, both conducted after trial in this matter. Resp.'s Second Lodging.

primary held under the blanket primary. In March 2000, California conducted its second primary under the statute, including a presidential primary. These two elections confirm that the blanket primary enhances the democratic nature of California's electoral process and the representativeness of its elected officials, as predicted by the courts below. *California Democratic Party v. Jones*, 169 F.3d 646, 660 (9th Cir. 1999) (hereafter "Opinion").

A. The Blanket Primary Encourages Candidates To Appeal To The Total Electorate

This Court has recognized that California's primary is a critical stage of the electoral process because it narrows the field of candidates. As a practical matter, the ultimate choice of voters in the general election is largely determined in the primary. See, *Storer v. Brown*, 415 U.S. 724, 735 (1974); *Morse v. Republican Party*, 517 U.S. 186, 205-206 (1996).

Under the closed primary system, voters in the general election were limited to choosing among those candidates pre-selected by a narrow subset of voters who did not reflect the total electorate. Pre-selection of the candidates through the closed primary system had particularly harmful effects in California, where the number of independent voters continues to grow rapidly. Opinion at 660-661. Since 1990, one-third of all new voters have registered as independents, as many as registered as Democrats and Republicans ***together***. RT at 939.[3] In California, most voters traditionally are not strong partisans –

[3] Amicus curiae adopts the same citation to the record used by the parties and courts below: "RT" is the Reporter's

Californians pride themselves on voting for the candidate, not for the party. RT at 652.[4]

The blanket primary now encourages candidates to appeal to a larger section of the electorate and thus, expands the scope of debate beyond limited partisan concerns. "Candidates will perceive a need ***or opportunity*** to attract support from the entire electorate, not simply from members of their respective parties." Opinion at 658 (emphasis added).[5] Past experience in California has proven this to be true, as illustrated by the decision of the unopposed Republican gubernatorial

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Transcript, "ER" is the Excerpt of Records, and "CR" is the District Court's Clerk's Record.

[4] The courts below explained why it is a misnomer to call people affiliated with a party in California's closed primary "party members." "These voters have not allied themselves to a political party in the customary way that one normally becomes a member of a private association; they have not paid dues, taken an oath, expressed agreement with certain ideals or goals, attended meetings, accepted any obligations, or attended upon any other rite of initiation." Opinion at 665.

It is therefore not surprising that in California, 23 percent of registered Democrats do not identify with the party, while another 36 percent do not consider themselves strong partisans. For registered Republicans, 24 percent do not identify with the party and 32 percent do not consider themselves strong partisans. RT at 651.

[5] Petitioners acknowledge that the blanket primary will broaden debate, but cite this as one of the ***harms*** of the measure. See RT at 721 [the blanket primary may, for example, require parties to "reopen" discussion of abortion].

candidate to participate in debates with the three contenders for the ***Democratic nomination***.[6]

B. Increased Debate, Competition And Interest Lead To Greater Voter Participation

Voter participation in California had declined markedly during the two decades prior to enactment of the blanket primary, dropping 15 to 20 percent. Opinion at 661; RT at 658, 661-662. In contrast, turnout in blanket primary states was higher than in California. Based upon this evidence, the courts below found "reason to expect" that, by providing more choice and more competitive elections, the blanket primary would encourage greater participation in California's primaries. Opinion at 662.

The courts' prediction was correct. Voter turnout in June 1998 was the highest in sixteen years for a gubernatorial primary. Resp.'s Second Lodging. This turnout was particularly remarkable given that the Republican race was virtually uncontested. Two years later, the March 2000 primary election also produced the highest voter turnout for a presidential primary in twenty years. *Ibid.*

California's voters adopted the blanket primary to provide greater choice, restore healthy competition and increase voter participation. Opinion at 649. The evidence to date is clear – the blanket primary has significantly increased the democratic nature of California's elections.

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[6] See Appellees' Request for Judicial Notice filed before the Ninth Circuit.

C. The Blanket Primary Produces More Representative Officials

California voters believed that the closed primary ultimately produced officeholders not representative of the electorate at large who were ill-suited to solve the State's problems. The blanket primary, they were told, would make elected officials more responsive to the total electorate. Opinion at 649. The record convincingly demonstrates that officials elected under blanket primaries do, in fact, stand closer to the median policy positions of their constituents than those elected under closed primaries. *Id.* at 661, fn. 34; RT at 693-696.

Governor Davis exemplifies this phenomenon. He campaigned in the blanket primary as a problem-solver, who would reflect the concerns and opinions of the broad electorate when governing, not of a narrow political constituency. His platform drew support from Republican, independent and minor party voters in the primary election – more support than for any other candidate. Resp.'s Second Lodging.[7] This support continued through the general election, where Governor Davis won by almost 20 percentage points. *Ibid.* As the courts below predicted, the blanket primary offers candidates with views who appeal to a broader base the ***opportunity*** to attract supporters from the entire electorate. Opinion at 658.

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[7] See also, R. Michael Alvarez & Jonathan Nagler, *Should I Stay or Should I Go? Sincere and Strategic Crossover Voting In California's Open/Blanket Primary: A Natural Experiment in Electoral Dynamics* (Bruce Cain & Elisabeth R. Gerber ed., forthcoming 2000) discussed in detail in the Amicus Curiae Brief submitted by the Brennan Center For Justice at pp. 15-16.

The State, moreover, has a "substantial interest" in ensuring that officeholders truly represent the broad community. Such support encourages compromise and political stability. *Storer v. Brown, supra,* 415 U.S. at 729. The blanket primary advances these state interests by producing elected officials who are more reflective of the electorate as a whole. Opinion at 662, fn. 34; RT at 693-696.

II.

THE CITIZENS OF CALIFORNIA SHOULD NOT BE PRECLUDED FROM THEIR DECISION TO ENHANCE THE DEMOCRATIC NATURE OF THEIR ELECTIONS

A. The Voters' Decision On Structuring Elections Should Be Respected

California's citizens adopted the blanket primary by a direct vote through the initiative process. California's initiative is "one of the most precious rights of our democratic process." It is a power reserved by the People to be "jealously guarded" in accordance with the view that all power of government ultimately resides with the People. *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore,* 18 Cal.3d 582, 591, 557 P.2d 473 (1976).

There can be no act more basic to a democracy than the direct vote of its citizens to increase the democratic nature of their election process and representativeness of those selected to govern. This vote represents the "considered judgment" of the citizens of California, and should not be lightly overturned. See *Gregory v. Ashcroft,* 501 U.S. 452, 471 (1991).

B. Preserving Confidence In The Electoral Process Is A Substantial State Interest

California's voters concluded that the blanket primary would produce more representative officials, who are less beholden to partisan politics and special interests. Opinion at 661. The courts below found that this "fundamental goal" of enhancing representativeness by providing all voters with a choice not predetermined by party members alone ***can only be advanced by the blanket primary***. *Id.* at 662.

Preserving confidence in our system of representative government is, of course, a substantial state interest. See, e.g., *United States Civil Service Com. v. National Asso. of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973); and *Buckley v. Valeo*, 424 U.S. 1 (1976). This includes assuring that independent-minded voters have an opportunity to associate and participate in the political process. See, *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

C. The Associational Rights Of Political Parties Are Not Absolute

"Partisan politics bears the imprimatur only of tradition, not the Constitution." *Elrod v. Burns*, 427 U.S. 347, 369, fn. 22 (1976). Neither the right to associate nor the right to participate in political activities is absolute. *United States Civil Service Com., supra*, 413 U.S. at 567. This Court has repeatedly found that preservation of the democratic process is an interest that may justify limitations on political activities otherwise protected by the First

Amendment. See *Elrod* at 368; *Buckley, supra*, 424 U.S. 1; and *United States Civil Service Com.* at 567.

While political parties have associational rights protected by the First Amendment, the courts below found that these interests were not severely burdened by the blanket primary. Opinion at 659. As demonstrated above, the two primaries conducted since trial confirm the courts' assessment.

This Court is asked to resolve conflicting interests under the First Amendment: the desire of party officials to close primary elections to party members only, versus the desire of the electorate – including a majority of party members – to increase the democratic nature of the election process. When asked to balance a similar conflict between the parties' interest in political patronage and its chilling effect upon the election process, this Court explained:

> "The illuminating source to which we turn in performing the task is the system of government the First Amendment was intended to protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern. Our decision in obedience to the guidance of that source does not outlaw political parties or political campaigning and management. Parties are free to exist and their concomitant activities are free to continue. We require only that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well." *Elrod* at 372; see also *Rutan v. Republican*

Party, 497 U.S. 62, 91-92 (1990) (Stevens, J., concurring).

Protection of the political parties' right of association is not the predominant goal. It is simply the means to achieve participation in the democratic process. Any benefits that the closed primary may provide to party officials are inadequate to justify sacrificing the voters' First Amendment interest in a truly democratic electoral process. See, e.g, *Elrod* at 370.

D. Structuring The Electoral Process Is A Political Question To Be Left To The Voters

The courts below correctly concluded that it was for California's voters, not the courts, to determine whether a more representative and participatory electoral system is desirable, and whether it is wise to open the primary to further these goals. Opinion at 662.

Balancing these interests is a "political arrangement," and where there is no bright line that can be known by judges and applied nationally the determination should be left to the People. See, e.g., *Rutan v. Republican Party, supra*, 497 U.S. at 110-114 (Scalia, J., dissenting). Courts are not representative bodies. "History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing . . . political pressures." *Dennis v. United States*, 341 U.S. 494, 525 (Frankfurter, J., concurring).

Constitutional issues cannot be resolved on the basis of public opinion. However, when a question is debatable, such as the relative benefits of the blanket primary, the voters' widespread belief as to its merits must be considered. See *Muller v. Oregon*, 208 U.S. 412, 420-421 (1908). As Justice Holmes cautioned: "I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that . . . the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Lochner v. State of New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); see also *United Public Workers v. Mitchell*, 330 U.S. 75, 102 (1947) [Congress' regulation of employees' political activities is upheld unless it "passes beyond the general existing conception of governmental power" developed from practice, history and changing societal conditions].

The blanket primary has been in continuous use since 1935. Opinion at 650. The decision of California's voters to adopt an electoral process enjoyed in other states since Franklin Roosevelt was President can hardly be said to infringe upon fundamental political principles as they have been understood by tradition and law.

CONCLUSION

As the courts below explained, the issue is not whether California's voters chose wisely in adopting the blanket primary. Instead, this Court must decide whether the First Amendment prohibits Californians from ever

adopting this electoral process. Opinion at 662-663. It does not.

California's voters properly concluded that the blanket primary will enhance the democratic nature of this State's elections and the representativeness of those elected to govern. The record below and experience to date bear this out. There is no support in law, policy, or our political tradition to conclude that the First Amendment – intended to ensure robust debate and participation in a representative democracy – ***prohibits*** the voters from utilizing this electoral process. As Justice Black explained:

> "Our political system, different from many others, rests on the foundation of a belief in rule by the people – not some, but all the people. Education has been fostered better to fit people for self-expression and good citizenship. In a country whose people elect their leaders and decide great public issues, the voice of none should be suppressed – at least such is the assumption of the First Amendment." *United Public Workers of America, supra,* 330 U.S. at 576-577 (Black, J., dissenting).

Consistent with our long tradition of constitutional law, the First Amendment cannot be read to prohibit California voters from structuring their elections to maximize both democratic participation and the representativeness of those elected to govern. The well-

reasoned judgment of the courts below should be affirmed.

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Respectfully submitted,

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